Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

~~79~~-556

GWEN DAVIS MITCHELL, *et al.*,

Petitioners,

vs.

PAUL BINDRIM,

Respondent.

Petition of Gwen Davis Mitchell for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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Respondent.

Petition of Gwen Davis Mitchell for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The Petitioner, Gwen Davis Mitchell ("Mitchell") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, entered in this proceeding on April 18, 1979.

Opinions Below.

The April 18, 1979 opinion of the California Court of Appeal is reported at 92 Cal.App.3d 61, 155 Cal.Rptr. 29 (1979) and is set forth as Appendix A to the Petition. The Order of the Court of Appeal denying a petition for rehearing and modifying the opinion is unreported and is set forth as Appendix B hereto. The California Supreme Court's July 12,

1979 order denying a hearing to review the Court of Appeal decision is unreported and is set forth as Appendix C hereto. The Order of the Superior Court for the County of Los Angeles on Defendant's Motion for Judgment Notwithstanding the Verdict, for New Trial, and to Retax Costs dated March 29, 1979, which was affirmed and reversed by the Court of Appeal, is set forth as Appendix D hereto.

Jurisdiction.

The judgment of the Court of Appeal was entered on April 18, 1979. A timely petition for a hearing to the Supreme Court of California was denied by order entered July 12, 1979 and this Petition has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented.

Petitioner Mitchell is the author of the fictional novel "Touching" of which separately petitioning Doubleday & Company, Inc., was publisher. This case raises a cluster of important questions of first impression in the free speech area which ask how to apply the principles of *New York Times v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964) where a work of contemporary fiction is alleged to libel. From the author's point of view these are:

1. How does *New York Times v. Sullivan* impact on the writing of contemporary fiction, as distinguished from news, specifically:

a. When a widely distributed novel is put forth as fictional and the plaintiff's alleged counterpart has a different name, age, appearance,

and personality, what is the appropriate standard of recognizability for there to be liability for libel? When a novel concerns significant contemporary problems, can the First Amendment tolerate a trial court's jury instruction, approved by the Court of Appeal below, that the fact of identification is established if only "*a third person* read the statement and reasonably understood the defamatory meaning and that the statement applied to plaintiff"?

b. In such a case when the plaintiff is a public figure and the author intended to, and did, present fiction, what must be shown to establish actual malice on her part?

c. How and where is the fact/opinion line to be drawn with regard to expressed sentiments in a work of contemporary fiction which concerns contemporary events and issues as well as a fictional character inspired by another?

d. When many of the statements objected and referred to by plaintiff and his attorney during the trial were not, as matters of constitutional law, defamatory, may the trial court permit the jury to roam through a 216 page novel and decide the case based on *its* determination of which statements therein may be the basis for an award of damages?

2. How is an author—who generally must indemnify his or her publisher—*in actual practice* to be protected by the principles and mandates of *New York Times v. Sullivan?* The question arises with increasing frequency in the trial courts, particularly when plaintiffs have exercised their right to jury trial and seek large sums from target

defendant publishers. It is squarely presented here, for a review of the record below makes it clear that the trial judge and the majority of the California Court of Appeal merely paid lip service to the decisions of this Court and then effectively ignored the principles for which they stand.

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Factual Background and Proceedings Below.

This action arises from the publication of the novel "Touching" in 1971.

Plaintiff and Respondent Bindrim is a psychologist who came to be known as "the father of the nude marathon," which was an extended, naked group encounter in vogue in the late 1960's and early 1970's. The parties stipulated that Bindrim was a "public figure" for the purposes of *New York Times v. Sullivan* and progeny.

Petitioner and Defendant Mitchell, who wrote "Touching", is a well known author of ten published novels, a volume of poetry, a book of meditations,

magazine articles, and a Broadway play, and is a critic for the New York Times Book Review.[1]

In October 1969, Mitchell attended one of Bindrim's weekend nude marathons at Sandstone, a "human potential center" in Topanga Canyon near Los Angeles. Her experience and observations left a deep and lasting impression.

Subsequently, Mitchell wrote a sensitive fictional novel entitled "Touching". Doubleday published "Touching" in hardcover in 1971, and it was later published in paperback by New American Library which was not a party to the action.

"Touching" is a novel about two women who, at turning points in their lives, attend a "nude encounter workshop" and are affected by what occurs. At the time of publication nude group therapy was still in vogue and quite controversial. Part of the novel's action occurs at the "workshop", and Mitchell—as any writer of contemporary fiction would—drew upon her experience at Bindrim's nude marathon.

"Touching" is *not a roman à clef*. It did include a therapist—Dr. Simon Herford—but he was by no means a central character. As noted by Justice Files in his dissent below in the California Court of Appeal: "Defendants' novel describes a fictitious therapist who

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[1]"Naked in Babylon", New American Library, 1960; "Someone's in the Kitchen with Dinah", Doubleday, 1962; "The War Babies", Coward-McCann Pub., 1966; "Sweet William", World Publishing, 1967; "The Pretenders", World Publishing, 1969; "Touching", Doubleday, 1971; "Kingdom Come", Putnam's, 1973; "The Motherland", Simon & Schuster, 1974; "The Aristocrats", Playboy Press, 1975; and "Ladies in Waiting", MacMillan, 1979.

"Changes", Nash Publishing, 1973.

"How to Survive In Suburbia When Your Heart's In the Himalayas", published by Wyden Books, 1976.

is conspicuously different from plaintiff in name, physical appearance, age, personality and profession." (92 Cal.App.3d 86; 155 Cal.Rptr. 43.) In addition, the dust jacket, cover, and title page of the book all made it clear to the reader that "Touching" was a novel, a work of fiction.

Nonetheless, Bindrim sued Mitchell and Doubleday in the Superior Court of the State of California for the County of Los Angeles claiming damages for libel and breach of contract. He claimed the therapist in "Touching", Dr. Simon Herford, was he—that he was identified with Dr. Herford and recognized by readers, that statements about Simon Herford were understood by readers of "Touching" to pertain to him, were "untrue," and were libelous as to him.

Defendants moved unsuccessfully for summary judgment on the ground, among others, that because Bindrim and Herford were different in name, appearance, and personality, and because there was no external identification, Bindrim was not identified and no statements in the fictional novel concerning Herford could reasonably be believed to pertain to him.

The case ultimately came on for jury trial before Judge Richard Wells on January 17, 1977. After nine days of trial, denial of petitioners' motions for nonsuit and directed verdict on the constitutional grounds, and three days of deliberation, the jury on February 1, 1977 found for Bindrim on libel and contract counts and awarded damages as follows: Against Mitchell: $38,000 compensatory damages for libel and $12,000 damages for breach of contract; Against Doubleday: $25,000 compensatory damages for libel and $25,000 punitive damages for libel.

Petitioners duly moved for Judgment Notwithstanding the Verdict and new trial, and on March 29, 1977 Judge Wells issued his Order denying the JNOV and granting the new trial subject to the condition that the motion for new trial would be denied if plaintiff would consent to reduction of the verdicts to the following: Against Mitchell: $25,000 general damages for libel; Against Doubleday: $25,000 general damages for libel. In addition the court effectively vacated the contract verdict, removing contract issues from the case. (See Appendix D.)

Judgment was duly entered, petitioners filed Notice of Appeal April 12, 1977, and Bindrim filed Notice of Cross Appeal April 29, 1977.

The California Court of Appeal, Second Appellate District, by the split decision appended hereto, affirmed and modified the judgment by turning the two $25,000 compensatory damages judgments into a single joint and several judgment of $50,000, *and* reinstating the $25,000 punitive damages award against Doubleday.

Mitchell and Doubleday duly petitioned for rehearing, pointing out that, in addition to violating the principles of *New York Times v. Sullivan,* the decision was self-evidently based on two false premises: (1) That Mitchell had made tape recordings at the nude marathon and had such recordings and a transcript thereof when she wrote, and (2) That the attribution of coarse language to Bindrim was false. On May 7, 1979, the Court of Appeal, Justice Files again dissenting, denied the Petition but modified its Opinion to remove the evidence of its original false premises.[2]

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[2]This aspect of the post opinion modification is covered in greater detail in Doubleday's petition.

Petitioners duly petitioned the California Supreme Court for hearing. On July 12, 1979, their Petition was denied without opinion or dissent, perhaps because that Court was at the time too preoccupied with its own problems to recognize the monster which had been hatched by the Court of Appeal.

REASONS FOR GRANTING THE WRIT.

The Trial Court's judgment in favor of Bindrim was unprecedented. The affirming decision of the Court of Appeal now constitutes the *sole precedent* on important Constitutional questions regarding the rights and liabilities of authors of contemporary fiction and the publishers of their work.

No judicial decision has ever cut closer to the heart of the creative process.

The great literature of our civilization has been contemporary fiction. If this decision is allowed to stand, it will chill literature and the dramatic arts throughout the United States and perhaps the world. Contemporary fiction might disappear, leaving us with historical novels and science fiction.

Times v. Sullivan and Contemporary Fiction.

There can be no question that a novel constitutes expression protected by the First Amendment. *A Book v. Attorney General of Massachusetts,* 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966).

Books, literature, are what we learn from. They stimulate our thinking. In these days of media noise, literature and the quieter, more contemplative arts are societally more important than ever.

The principles of Times v. Sullivan are, of course, applicable. But they must be adapted because of the nature of literature and fiction, which by definition, is neither true nor false.

It was stipulated that Bindrim was a public figure. In a *conventional* libel case he would have had the burden of proving by "clear and convincing evidence" that each defendant acted with "actual malice", that

is, with knowledge of falsity or reckless disregard as to truth. But this was not a conventional case and the standard rules did not fit the problem. Despite the fact that much of it was based on the author's experience and perceptions, "Touching" was self-evidently a work of fiction. It was conceded by all to be, and to have been presented as, fiction. By definition fiction is neither true nor false. As this Court has acknowledged, fiction is a significant form of expression for the communication of ideas which affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501, 96 L.Ed. 1098, 72 S.Ct. 777 (1952).

The *New York Times* questions therefore had to be: (1) whether Mitchell knowingly, intentionally, or recklessly made plaintiff recognizable to a substantial segment of the public, (2) whether Mitchell made knowingly false or reckless statements about plaintiff, and (3) whether a substantial number of persons *recognized* plaintiff in the fiction *and believed* the statements concerning the character inspired by him were *about* him.

Had the case been so framed by the trial court or the Court of Appeal, there could have been no liability.

A. Malice: There Was No Evidence to Support a Finding of Malice.

While she freely admitted that many elements of "Touching" were inspired by her experience at Bindrim's nude marathon, Mitchell testified *without contra-*

diction that, as thousands of novelists before her, *she intended to create a character, Dr. Simon Herford,* and not to identify Bindrim:

> "Q. Did you attempt to portray any living or existing people in your novel?
>
> A. Quite the reverse. I went to extreme care to make sure that no one really resembled anyone so that people would walk along the street and say, 'Hey, I know who that is.'
>
> Q. Now, with regard to Paul Bindrim here, what did you do to make Dr. Simon Herford different in addition to, of course, changing the name and giving him a degree?
>
> A. Well, first of all I gave him an extraordinary amount of hair because the primary characteristic, physical characteristic of Paul Bindrim was that he was . . . nearly bald and that hair which remained on his head was very close-cropped. He was extremely clean-shaven, and he was not old.
>
> Simon Herford, in the book, is an older man, he is very professorial, which is also not Mr. Bindrim's way, to give him both age which I think characterizes with it a certain amount of dignity and all of this hair, plus a great white beard, making him Santa Clausy, and I gave him bright green eyes which are in the book."[3]

This testimony was supported by the best sort of documentary evidence, *i.e.*, "Touching" itself in which the name, physical and other description, and personality of Herford differed markedly from those of Bindrim.

---

[3]R.T. 590-91.

As to the *New York Times* requirement of proof of knowing publication of an *untruth,* Mitchell testified, and her novel proves, she did not intend or purport to communicate facts at all, she wrote a work which she represented and intended to be accepted as *fiction.*

In addition, the passages which Bindrim claimed to be untrue are descriptions which, read in context, are no more than the author's opinions about a contemporary phenomenon. Insofar as these opinions might be considered to concern extended nude encounter sessions, Bindrim, and his controversial techniques, they were Mitchell's honest opinions. As Justice Files notes in his dissents, there was never any suggestion that they were otherwise.

This Court has recognized that opinions are neither true nor false, *Gertz v. Robert Welch Inc.,* 418 U.S. 323, 339-340, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974), and cannot permit the expression of such in a work of contemporary fiction to constitute malice.

The worst that could ever be said about Mitchell is, in hindsight, that she failed to make her Dr. Herford more unlike Mr. Bindrim. Perhaps this was an error in judgment, but this Court has specifically held that errors of judgment cannot be held to constitute actual malice. *Time v. Pape,* 401 U.S. 279, 290-291, 28 L.Ed. 2d 45, 91 S.Ct. 633 (1971).

B. Identification/Recognizability.

Bindrim won below because the trial court and the Court of Appeal were persuaded that the law should provide that a widely disseminated book that may be read by thousands, if not millions, may be found to be defamatory if *a single person* (*other than plain-*

tiff) is able to guess the identity of the person, or persons, who inspired a fictitious character.

That holding below is absurd, impractical, simplistic, and dangerous. It is dangerous because it totally chills contemporary fiction. As noted by Justice Files below, it "poses a grave threat to any future work of fiction. . . ." (92 Cal.App.3d 85; 155 Cal.Rptr. 43.) It would permit *any* claimant, no matter how farfetched his claim, no matter how crazy, to get his claim against any author to a jury. This is a sort of open ended exposure which is uninsurable. Thus, the more successful an author has been in the past, the more he or she would be chilled in the future.

The record below illustrates the danger and absurdity of the holding. Bindrim was unable to produce a single witness who "recognized" him in "Touching" *and* was not intimately familiar with him and his practices beforehand or actually present at the "marathon" in question.

As his name is dissimilar from that of his supposed counterpart in "Touching" and he differed physically and personality-wise, this was hardly surprising. To be specific, Herford was a doctor and was addressed "Dr."; Bindrim was *not* a doctor at the time of the marathon or at the time of the publication, and he was not addressed as "Dr." Herford had a mass of white hair and striking green eyes; Bindrim was younger and virtually bald and had dark brown eyes. Their personalities and styles differed sharply.

Aside from his own self-serving statements as to his alleged identifiability, Bindrim produced only three identification witnesses: Herbert Otto, Eleanor Hoover, and Edward Hiler. *All three were intimates whose*

alleged recognition was based on friendship and very special knowledge.

And even they admitted they had understood "Touching" to have been presented as fiction!

Witness Otto had known Bindrim professionally and personally for years, had attended one of Bindrim's marathons, and had read a number of his publications. He and Bindrim were good friends, and they were both deep into the "human potential movement." Otto had even conducted his own nude marathon at Sandstone. He claimed not to have noticed the physical description of Dr. Herford in "Touching". He claimed Bindrim was identifiable in the 1971 book *only* because Bindrim had originated the nude encounter in 1967, had written about "peak experiences", and because of the character's "style of talking to people"; but he admitted that by 1971 when "Touching" was published a dozen or two psychologists were conducting nude marathons and that "many psychologists and psychiatrists" used four-letter words in therapy. Perhaps most important, Otto understood "Touching" to be, and to have been presented as, a work of fiction.

Witness Hoover, a journalist trained as a psychologist, was a former close friend of Mitchell who had sued her. She had been to one of Bindrim's nude marathons and had written about it herself. She had told Mitchell about Bindrim's nude marathons and recommended she attend one. She discussed the marathon with Mitchell after the event, and Mitchell had given

her a copy of the "Touching" manuscript prior to publication. Hoover "recognized" Bindrim in the book:

> "For two reasons, I would say: I knew that she had gone, and I immediately realized what she had gone for. Also Paul Bindrim then was the major innovator in this field and was associated with it."[4]

Hoover also understood the book to be fiction: ". . . an extraordinary twisting of what I knew to be facts coming from real people into fiction" (R.T. 451, lines 6-7), and admitted that:

> *"It is presented as a novel. A novel is fiction."*[5]

Witness Hiler was an even weaker identification witness. Not only was he a psychologist friend of Bindrim and familiar with his work, *he attended the same nude marathon as Mitchell and only read "Touching" after being told by Bindrim of the alleged identification and the lawsuit.* Hiler's "identification" testimony was simply that portions of "Touching" described the marathon and Bindrim's techniques. He testified that he looked upon the book as "semifictional" and that one would have to know Bindrim to recognize him.

Much stronger evidence of recognizability—six witnesses who were not insiders, coupled with a measure of belief and what the Supreme Court of Alabama considered to be "common knowledge"—was considered totally inadequate to support a jury verdict by this

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[4]R.T. 446, lines 17-20.

[5]R.T. 465, line 6.

Court in New York Times v. Sullivan. (376 U.S. at 288-289.)

Nevertheless, the trial court denied petitioners' motion for nonsuit and then refused Defendants' Instructions 7 and 10[6] describing the degree and standard of identification Bindrim was required to prove, specifically, that "a substantial segment of the general public who read 'Touching' believed statements concerning Herford were actually about him." Instruction No. 7 also pointed out identification by "plaintiff, or a small group of insiders or close friends, or persons who attended the same marathon" was insufficient. These instructions also contained the *New York Times* requirements that plaintiff had to prove that defendants "intentionally" or "consciously" identified Bindrim and that "clear and convincing" evidence was required.

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[6]DEFENDANTS' REQUESTED INSTRUCTION NO. 7

The novel "Touching" does not name the plaintiff. In order to recover, therefore, the plaintiff must show by clear and convincing evidence that defendants intentionally identified him as the character Dr. Simon Herford and that a substantial segment of the general public who read "Touching" believed statements concerning Dr. Herford were actually about him.

In other words, it is not enough for you to find that the plaintiff, or a small group of insiders or close friends, or persons who attended the same nude marathon as defendant Mitchell, identified him with Dr. Simon Herford. Unless you find he was recognized by a substantial segment of the public, you must find for defendants.

DEFENDANTS' REQUESTED INSTRUCTION NO. 10

Plaintiff Paul Bindrim is what is known in the law as a public figure, a person who has intentionally placed himself in the public eye. The Constitutions of the United States and the State of California require that, in order for a public figure to recover for libel, he must prove that the defendant acted with knowledge that the challenged statement was false or with reckless disregard of whether it was false or not.

In addition, in this case plaintiff must prove that the defendants consciously tried to, and did, make him identifiable by the public as Dr. Simon Herford and that a substantial segment

By giving Plaintiff's Instruction B[7] *which told the jurors that plaintiff need only prove "by a preponderance of the evidence" that "A THIRD PERSON read the statement and reasonably understood the defamatory meaning and that the statement applied to plaintiff", the Court compounded its error and virtually ORDERED the jury to bring in a plaintiff's verdict.*

As noted by Justice Files, the instruction also in vited the jury to adopt plaintiff's basic contention that he could be libeled by criticism.

C. Fact/Opinion in the Context of Contemporary Fiction.

As Justice Files' dissent eloquently notes, most, if not all, of the statements of which Respondent Bindrim complained constituted expressions of opinion about the fictional therapist's practices and techniques: "When you criticize my occupation, you libel me." (92 Cal. App.3d 89; 155 Cal.Rptr. 45.

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of the public did in fact believe that Dr. Simon Herford was in fact Paul Bindrim.

Plaintiff has the burden of proving those matters by clear and convincing evidence; that is, evidence that is "clear, explicit and unequivocal," "so clear as to leave no substantial doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind."

[7]PLAINTIFF'S INSTRUCTION B

On the libel cause of action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

1. That defendants caused a libelous statement regarding plaintiff to be published;
2. That such act was done by defendants with actual malice;
3. *That a third person read the statement and reasonably understood the defamatory meaning and that the statement applied to the plaintiff;*

* * *

(Emphasis added)

The First Amendment cannot tolerate a judgment based on such expressions of opinion. This Court in *Gertz* stated that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of Judges and juries but on the competition of other ideas." 418 U.S. at 339-340.

D. When a Novel Is Accused of Libeling, Must Not the Trial Court Point Out to the Jury Which Statements Therein Are Susceptible of a Libelous Interpretation?

The hardcover version of "Touching" contains 216 pages. Plaintiff contended *34* statements were libelous. Most, if not all, of these were non-libelous as a matter of law because they expressed opinion, were "true", or did not apply to the therapist.

The initial determination as to whether *any* statement is susceptible of a defamatory interpretation is *for the court,* under both common law and the Constitution, and if the material published is not "fairly susceptible of a defamatory meaning", the court must dismiss the claim. If it is susceptible of such meaning, the question of meaning becomes one of fact for the jury.

In a public figure case involving a lengthy novel, this duty of distinguishing the non-libelous from the possibly libelous is particularly important.

In this case the trial court clearly had a duty to make these determinations. Defendants duly requested that it advise the jury which statements were susceptible of a defamatory meaning by offering Instruction No. 8, quoted in the majority opinion below, and it was egregious error amounting to a denial of due process for the trial court not to do so.

Justice Files recognized that "the court sent the case to the jury without distinction between actionable defamation and constitutionally protected criticism." (92 Cal.App.3d 85; 155 Cal.Rptr. 43.) In brushing over the point, the majority of the Court of Appeal ignored this Court's admonition that "the separation of legitimate from illegitimate speech calls for more sensitive tools. . . .", *Speiser v. Randall,* 357 U.S. 513, 525, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958), and illogically stated, in footnote 5:

> "We find it unnecessary to discuss each alleged libel separately, since if any of the alleged libels fulfill all the requirements of libel, that is sufficient to support the judgment."

Conclusion.

"A novel," said Saul Bellow, in his address upon accepting the Nobel Prize for literature in 1976, "is balanced between a few true impressions and the multitude of false ones that make up what we call life. It tells us that for every human being there is a diversity of existences, that the single existence is in itself an illusion in part, that these many existences signify something, tend to something, fulfill something: it promises us meaning, harmony, and even justice."

For the reasons set forth above, a Writ of Certiorari should be issued to review the judgment and opinion of the California Court of Appeal.

DATED: October 4, 1979.

Respectfully submitted,

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Gwen Davis Mitchell.

APPENDIX A.

Opinion of the Court of Appeal.

Certified for Publication

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Paul Bindrim, Plaintiff, Respondent and Cross-Appellant, v. Gwen Davis Mitchell, et al., Defendants, Appellants and Cross-Defendants. 2 Civ. No. 52133 (Super. Ct. No. WE C-24045).

Filed April 18, 1979.

APPEAL and CROSS-APPEAL from a judgment of the Superior Court, Los Angeles County. Richard L. Wells, Judge.

Lillick, McHose & Charles, Anthony Liebig and Kathleen Hallberg, for Defendant, Appellant and Cross-Defendant Mitchell.

Satterlee & Stephens, Robert M. Callagy, Katherine J. Trager, Lillick, McHose & Charles, Anthony Liebig and Kathleen Hallberg, for Defendant, Appellant and Cross-Defendant Doubleday.

Slaff, Mosk & Rudman, George Slaff and Marc R. Stein, for Plaintiff, Respondent and Cross-Appellant.

This is an appeal taken by Doubleday and Gwen Davis Mitchell from a judgment for damages in favor of plaintiff-respondent Paul Bindrim, Ph.D. The jury returned verdicts on the libel counts against Doubleday and Mitchell and on the contract count against Mitchell.

The court denied defendants' motion for judgment NOV and granted a new trial subject to the condition that new trial would be denied if plaintiff would consent to (1) a reduction of the libel verdict against Mitchell from $38,000 to $25,000; (2) a striking of the $25,000

punitive damage award against Doubleday on the libel count; and (3) a striking of the $12,000 damage award on the contract count against Mitchell.

Plaintiff consented without prejudice on these issues in any appeal to be taken from the judgment. Defendants appealed and plaintiff cross-appealed from the judgment reducing the original jury verdict.

Plaintiff is a licensed clinical psychologist and defendant is an author. Plaintiff used the so-called "Nude Marathon" in group therapy as a means of helping people to shed their psychological inhibitions with the removal of their clothes.

Defendant Mitchell had written a successful best seller in 1969 and had set out to write a novel about women of the leisure class. Mitchell attempted to register in plaintiff's nude therapy but he told her he would not permit her to do so if she was going to write about it in a novel. Plaintiff said she was attending the marathon solely for therapeutic reasons and had no intention of writing about the nude marathon. Plaintiff brought to Mitchell's attention paragraph B of the written contract which reads as follows:

> "The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants."

Mitchell reassured plaintiff again she would not write about the session, she paid her money and the next day she executed the agreement and attended the nude marathon.

Mitchell entered into a contract with Doubleday two months later and was to receive $150,000 advance royalties for her novel.

Mitchell met Eleanor Hoover for lunch and said she was worried because she had signed a contract and painted a devastating portrait of Bindrim.

Mitchell told Doubleday executive McCormick that she had attended a marathon session and it was quite a psychological jolt. The novel was published under the name "Touching" and it depicted a nude encounter session in Southern California led by "Dr. Simon Herford."

Plaintiff first saw the book after its publication and his attorneys sent letters to Doubleday and Mitchell. Nine months later the New American Library published the book in paperback.

The parallel between the actual nude marathon sessions and the sessions in the book "Touching" was shown to the jury by means of the tape recordings Mitchell* had taken of the actual sessions. Plaintiff complains in particular about a portrayed session in which he tried to encourage a minister to get his wife to attend the nude marathon. Plaintiff alleges he was libeled by the passage below:

Page Excerpts from "Touching"
126-27

> The minister was telling us how the experience had gotten him further back to God,
>
> And all the time he was getting closer to God, he was being moved further away from his wife, who didn't understand, she didn't understand at

*Changed to "Bindrim" in Order Modifying Opinions and Denying Rehearing.

all. She didn't realize what was coming out of the sensitivity training sessions he was conducting in the church.

. . . he felt, he more than felt, he knew, that if she didn't begin coming to the nude marathons and try to grasp what it was all about, the marriage would be over.

"You better bring her to the next marathon," Simon said.

"I've been trying," said the minister. "I only pray she comes."

"You better do better than pray," said Simon. "You better grab her by the cunt and drag her here."

"I can only try."

"You can do more than try, Alex. You can grab her by the cunt.

"A man with that kind of power, whether it comes from God or from his own manly strength, strength he doesn't know he has, can drag his wife here by the fucking cunt.

"I know," Alex said softly. "I know."

Transcript of Actual Session

"I've come a little way,"

"I'd like to know about your wife. She hasn't been to a marathon?"

"No."

"Isn't interested? Has no needs?"

"I don't—she did finally say that she would like to go to a standard sensitivity training session somewhere. She would be—I can't imagine her in a nude marathon. She can't imagine it."

"Why?"

"Neither could I when I first came.

"Yeh. She might. I don't know."

"It certainly would be a good idea for two reasons: one, the minor one is that you are involved here, and if she were in the same thing, and you could come to some of the couple ones, it would be helpful to you. But more than that, almost a definite recipe for breaking up a marriage is for one person to go into growth groups and sense change and grow . . ."

"I know that."

"Boy they sure don't want that, and once they're clear they don't need that mate anymore, and they are not very patient."

"But it is true, the more I get open the more the walls are built between us. And it's becoming a fairly intelligent place, a fairly open place, doing moderate sensitivity eyeballing stuff with the kids. I use some of these techniques teaching out class work."

"Becoming more involved?"

"Yes, involved at the same time that I am more separated from. It's a paradox again, isn't it?"

"Mmm."

Plaintiff asserts that he was libeled by the suggestion that he used obscene language which he did not in fact use. Plaintiff also alleges various other libels due to Mitchell's inaccurate portrayal of what actually happened at the marathon. Plaintiff alleges that he was injured in his profession and expert testimony was introduced showing that Mitchell's portrayal of plaintiff

was injurious and that plaintiff was identified by certain colleagues as the character in the book, Simon Herford.

I

Defendants first allege that they were entitled to judgment on the ground that there was no showing of "actual malice" by defendants. As a public figure,[1] plaintiff is precluded from recovering damages for a defamatory falsehood relating to him, unless he proved that the statement was made with "actual malice," that is, that it was made with knowledge that it is false or with reckless disregard of whether it was false or not. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280.) The cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731.) Thus, what constitutes actual malice focuses on defendants' attitude toward the truth or falsity of the material published and reckless disregard of the truth or falsity cannot be fully encompassed by one infallible definition but its outer limits must be marked by a case-by-case adjudication. (*Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 434.)

Evidence establishing a reckless disregard for the truth must be clear and convincing evidence, and proof by a preponderance of evidence is insufficient. (*New York Times Co. v. Sullivan* (1964) *supra,* 376 U.S. 254, at pp. 285-286.) Whether or not there was such

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[1]Plaintiff admits, and the evidence shows, that he is a public figure.

malice is a question of fact to be determined by the trier of fact. (*Widener v. Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d 415.) However, the reviewing court is required to review the evidence in a libel action by a public figure, to be sure that the principles were constitutionally applied. (*Montandon v. Triangle Publications, Inc.* (1975) 45 Cal.App. 3d 938, 948.) The court has the duty to examine the record to determine whether it could constitutionally support a judgment in favor of plaintiff, but this does not involve a de novo review of the proceedings below wherein the jury's verdict is entitled to no weight. (*Widener v. Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d at p. 433.)

There is clear and convincing evidence to support the jury's finding that defendant Mitchell entertained actual malice, and that defendant Doubleday had actual malice when it permitted the paperback printing of "Touching," although there was no actual malice on the part of Doubleday in its original printing of the hardback edition.

Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter.[2] Since she attended sessions *and had transcripts of actual conversations between plaintiff and the participants,** there can be no suggestion that she did not know the true facts. Since "actual malice" concentrates solely on defendants' attitude toward the

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[2]The fact that "Touching" was a novel does not necessarily insulate Mitchell from liability for libel, if all the elements of libel are otherwise present.

*Italicized words deleted by Order Modifying Opinions and Denying Rehearing.

truth or falsity of the material published (*Carson v. Allied News Co.* (1976) 529 F.2d 206; *Widener v. Pacific Gas & Electric Co.* (1977), *supra,* 75 Cal.App. 3d 415, and not on malicious motives,[3] certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.

However, plaintiff failed to prove by clear and convincing evidence that the original hardback publication by Doubleday was made with knowledge of falsity or in reckless disregard of falsity. McCormick of Doubleday cautioned plaintiff that the characters must be totally fictitious and Mitchell assured McCormick that the characters in "Touching" were incapable of being identified as real persons. McCormick arranged to have the manuscript read by an editor knowledgeable in the field of libel. The cases are clear that reckless conduct is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication, (*St. Amant v. Thompson* (1968) *supra,* 390 U.S. 727, 731), and there is nothing to suggest that Doubleday entertained such doubts prior to the hardback publication.

Plaintiff suggests that, since the book did not involve "hot news," Doubleday had a duty to investigate the content for truth. Courts have required investigation

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[3]There is no suggestion that Mitchell was being malicious in the fabrication; her intent may have been to be colorful or dramatic.

as to truth or falsity of statements which were not hot news (*Widener v. Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d 415; *Carson v. Allied News Co.* (1976), *supra,* 529 F.2d 206), but those cases involved factual stories about actual people. In the case at bar, Doubleday had been assured by Mitchell that no actual, identifiable person was involved and that all the characters were fictitious in the novel. Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate. (See *Baldine v. Sharon Herald Co.* (1968) 391 F.2d 703, 707.) There was nothing in the record to suggest that, prior to the hardback printing defendant Doubleday in fact entertained serious doubts as to the truth or falsity of the publication, and investigatory failure alone are insufficient to find actual malice.

However, prior to the paperback printing there were surrounding circumstances to suggest inaccuracy, such that at that point Doubleday had a duty to investigate. Plaintiff did show that Doubleday sold the rights to the New American Library after receiving a letter from plaintiff's attorney explaining that plaintiff was Herford and the inscription in the paperback said, "This is an authorized edition published by Doubleday and Company," Although, after the receipt of the plaintiff's attorney's letter, Doubleday again inquired of Mitchell as to whether plaintiff was the character in the book, the jury was entitled to find that Mitchell's assurance to Doubleday was not sufficient to insulate Doubleday from liability and that Doubleday had some further duty to investigate. The jury could have inferred that at that point Doubleday either had serious doubts, or should have had serious doubts, as to the possibility

that plaintiff was defamed by "Touching" and that at that point Doubleday had some duty to investigate.[4]

II

For similar reasons, the award for punitive damages against Doubleday may stand. A public figure in a defamation case may be awarded punitive damages when there is "actual malice" under the *New York Times* standard (*Maheu v. Hughes Tool Co.* (1977) 569 F.2d 459), and, as we have said above, actual malice was established for Doubleday. The *jury** below erroneously struck the award of punitive damages against Doubleday, on the ground that the jury did not award even token punitive damages against Mitchell although she had $165,000 in community property. The judge reasoned that the jury apparently found no fault of "malice attributable to her." However, the jury must have found that Mrs. Mitchell had "actual malice" to have awarded even compensatory damages against her. And the standard for punitive damages for libel of a public figure is "actual malice," under the *New York Times* case, not hatred. Since all that is required for punitive damages of a public figure is actual malice and not hatred (see *Maheu v. Hughes Tool Co., supra*), and since both Doubleday and Mitchell had "actual malice," it follows that punitive damages *could* have been awarded against both defendants. But since punitive damages are discretionary and wealth

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[4]Note: This paperback edition was published by New American Library, not by Doubleday, but was apparently published with Doubleday's permission. The parties do not raise the issue of whether Doubleday's "permission," i.e., whether Doubleday's "causing" the book to be published by another company, is actually a "publication" for purposes of libel, by Doubleday.

*Changed to "trial court" by Order Modifying Opinion and Denying Rehearing.

may be taken into account (see *Sandoval v. Southern Cal. Enterprises, Inc.* (1950) 98 Cal.App.2d 240, 250), it was proper to award punitive damages only against one defendant, and not the other.

III

Appellants claim that, even if there are untrue statements, there is no showing that plaintiff was identified as the character, Simon Herford, in the novel "Touching."

Appellants allege that plaintiff failed to show he was identifiable as Simon Herford, relying on the fact that the character in "Touching" was described in the book as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms" and that Bindrim was clean shaven and had short hair. Defendants rely in part on *Wheeler v. Dell Publishing Co.* (1962) 300 F.2d 372, which involved an alleged libel caused by a fictional account of an actual murder trial. The *Wheeler* court said (at p. 376):

> "In our opinion, any reasonable person who read the book and was in a position to identify Hazel Wheeler with Janice Quill would more likely conclude that the author created the latter in an ugly way so that none would identify her with Hazel Wheeler. It is important to note that while the trial and locale might suggest Hazel Wheeler to those who knew the Chenoweth family, suggestion is not identification. In *Levey* [*Levey v. Warner Bros. Pictures* (S.D.N.Y. 1944) 57 F.Supp. 40] the court said those who had seen her act may have been reminded of her by songs and scenes, but would not reasonably identify her."

However, in *Wheeler* the court found that no one who knew the real widow could possibly identify her with the character in the novel. In the case at bar, the only differences between plaintiff and the Herford character in "Touching" were physical appearance and that Herford was a psychiatrist rather than psychologist. Otherwise, the character Simon Herford was very similar to the actual plaintiff. We cannot say, as did the court in *Wheeler*, that no one who knew plaintiff Bindrim could reasonably identify him with the fictional character. Plaintiff was identified as Herford by several witnesses and *defendant's** own tape recordings of the marathon sessions show that the novel was based substantially on plaintiff's conduct in the nude marathon.

Defendant also relies on *Middlebrooks v. Curtis Publishing Co.* (1969) 413 F.2d 141, where the marked dissimilarities between the fictional character and the plaintiff supported the court's finding against the reasonableness of identification. In *Middlebrooks*, there was a difference in age, an absence from the locale at the time of the episode, and a difference in employment of the fictional character and plaintiff; nor did the story parallel the plaintiff's life in any significant manner. In the case at bar, apart from some of those episodes allegedly constituting the libelous matter itself, and apart from the physical difference and the fact that plaintiff had a Ph.D., and not an M.D., the similarities between Herford and Bindrim are clear, and the transcripts of the actual encounter weekend show a close parallel between the narrative of plaintiff's novel and the actual real life events. Here, there were many similarities between the character, Herford, and

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*Changed to "plaintiff's" by Order Modifying Opinion and Denying Rehearing.

the plaintiff Bindrim and those few differences do not bring the case under the rule of *Middlebrooks*. (See *Fetler v. Houghton Mifflin Co.* (1966) 364 F.2d 650.) There is overwhelming evidence that plaintiff and "Herford" were one.

IV

However, even though there was clear and convincing evidence to support the finding of "actual malice," and even though there was support for finding that plaintiff is identified as the character in Mitchell's novel, there still can be no recovery by plaintiff if the statements in "Touching" were not libelous. There can be no libel predicated on an opinion. The publication must contain a false statement of fact. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596.)

Plaintiff alleges that the book as a whole was libelous and that the book contained several false statements of fact. Plaintiff relies in part on the above quoted conversation between plaintiff and the minister as one libelous statement of fact. Plaintiff also argues that a particular incident in the book is libelous. That incident depicts an encounter group patient as so distressed upon leaving from the weekend therapy that she is killed when her car crashes. Plaintiff also complains of an incident in the book where he is depicted as "pressing," "clutching," and "ripping" a patient's cheeks and "stabbing against a pubic bone." Plaintiff complains, too, of being depicted as having said to a female patient, "Drop it, bitch." There are also other incidents alleged to be libelous.[5]

Our inquiry then, is directed to whether or not any of these incidents can be considered false statements

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[5]We find it unnecessary to discuss each alleged libel separately, since if any of the alleged libels fulfill all the requirements of libel, that is sufficient to support the judgment.

of fact. It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: *i.e.*, substantially inaccurate description of what actually happened. It is also clear that some of these portrayals cast plaintiff in a disparaging light since they portray his language and conduct as crude, aggressive, and unprofessional.

Defendants here rely on the cases which have considered the difference in published materials between factual statements and matters of mere opinion. While, as we discuss below, we do not feel that those cases necessarily express the rules applicable where, as here, the published material purports to state actual facts concerning the characters in a novel, we proceed, first, to examine the cases on which defendants rely.

Many cases discuss the difference between fact and opinion. The court in *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, examined the use of the term "blackmail" in a controversy between the parties over zoning, and found that, although the use of that term in some circumstances could constitute libel, in the *Bresler* case the term was being used figuratively and did not connote actual commission of a crime.

In *Letter Carriers v. Austin* (1974) 418 U.S. 264, Jack London called someone a "scab," and defined the term with the phrase as a "traitor to his God, his country, his family and his class." (*Id.*, at p. 268.) Again, the *Austin* court held that the statements were used loosely and figuratively, and there was no libel in the use of the term "traitor." Thus, words that appear factual at first glance, such as "blackmail," and "traitor" may not be factual, depending on the context in which they were used, and whether they were used figuratively.

The courts have set guidelines in determining what is fact and what is opinion. One guideline is that an alleged defamatory statement may constitute a fact in one context and an opinion in another and content of the commuication is taken as a whole. In certain settings fiery rhetoric and hyperbolic statements of fact may well assume the character of opinion. (*Gregory v. McDonnell Douglas Corp.* (1976) *supra,* 17 Cal.3d 596.) Where the statements are unambiguously fact or opinion, *Gregory* applies, and the court determines as a matter of law whether the statements are fact or opinion. However, where the alleged defamatory remarks could be determined either as fact or opinion, and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury. (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672.)[6]

If viewed as a case involving an issue of "opinion," those cases, and other cases involving that issue, make it clear that, since there was evidence that people had identified plaintiff with the Dr. Herford of the book, the jury's finding against defendants is conclusive on that issue.

However, as we have indicated above, we regard the case at bench as involving a different issue. Defendants contend that the fact that the book was labeled as being a "novel" bars any claim that the writer or publisher could be found to have implied that the characters in the book were factual representations not

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[6]Here, unlike the *Good Government* case, there is no actual "ambiguous" language in the novel. However, whether the literary incidents were understood by those readers who identified plaintiff with Herford as strictly fictional or as based on fact is similar to the question before the court in *"Good* Government" and the reasoning of that case applies.

of the fictional characters but of an actual non-fictional person. That contention, thus broadly stated, is unsupported by the cases. The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described. (*Middlebrooks v. Curtis Publishing Co.* (1969) *supra*, 413 F.2d 141, 143.) Each case must stand on its own facts. In some cases such as *Greenbelt Pub. Assn. v. Bresler* (1970), *supra,* 398 U.S. 6, an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted. Similarly, in *Hicks v. Casablanca Records* (D.C. S.D.N.Y. 1978) ..... F.Supp. ....., a trier of fact was able to find that, considering the work as a whole, no reasonable reader would regard an episode, in a book purporting to be a biography of an actual person, to have been anything more than the author's imaginative explanation of an episode in that person's life about which no actual facts were known. We cannot make any similar determination here. Whether a reader, identifying plaintiff with the "Dr. Herford" of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for the jury. Its verdict adverse to the defendants cannot be overturned by this court.

V

Defendants raise the question of whether there is "publication" for libel where the communication is to only one person or a small group of persons rather than to the public at large. Publication for purposes

of defamation is sufficient when the publication is to only one person other than the person defamed. (*Brauer v. Globe Newspaper Co.* (1966) 217 N.E.2d 736, 739.) Therefore, irrelevant whether all readers realized plaintiff and Herford were identical.

VI

Appellant Doubleday alleges several charges to the jury were erroneous, and that the court improperly refused to give certain proffered instructions by them. Doubleday objects that the court erred when it rejected its instruction that Bindrim must prove by clear and convicting evidence that defendants intentionally identified Bindrim. Firstly, the "clear and convincing evidence" standard applies to the proving that the act was done with "actual malice" and an instruction to that effect was given by the court. Secondly, defendants' instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim, was properly refused. For the tort of defamation, publication to one other person is sufficient, *supra*.

Defendant objects that the court refused the following instruction:

> "DEFENDANTS' REQUESTED INSTRUCTION NO. 8
>
> "The following statements in "Touching," and no others, may be considered by you to be possibly libelous:
>
> 1. The statement at page ...., lines .....
>
> "If you find that none of those statements libeled plaintiff, you must find for defendants."

Defendants argue that by the refusal of the above instruction the court failed to instruct the jury that

it could only assess liability if it determined that the challenged statements were libelous. The court did instruct adequately in that area. The court instructed:

"DEFENDANTS' INSTRUCTION NO. 9

"In order to recover for libel, plaintiff must prove that a statement in the novel 'Touching' is reasonably susceptible of a libelous interpretation. In making this determination you should consider the novel as a whole and the context of said statement.

"In determining whether a statement is capable of a libelous meaning, you should construe the words according to the fair and natural meaning that will be given them by reasonable persons of ordinary intelligence."

Defendant Doubleday claims confusion in the instruction on standard of proof. The instruction on clerk's transcript page 111 explained to the jury the additional burden of proof required for "actual malice."

Defendant alleges that the court failed to instruct the jury that the author and publisher should be considered separately for purposes of liability. However, the court did instruct the jury to consider each defendant separately and to decide each defendant's case separately.

Appellant Mitchell objects that the trial court erroneously allowed one of Bindrim's identification witnesses, Otto, to testify that a psychologist in 1971 or 1972 who was familiar with nudity and psychotherapy literature would be able to recognize Herford as Bindrim, and that someone who did not know Bindrim personally but was familiar with the literature would recognize Bindrim, citing only California Evidence Code section 800. First of all, defendant's objection to the lower

court did not clearly state his ground of objection. Secondly, there was other evidence of identification by Hoover and by Hiller. And Otto also testified that he himself identified Bindrim as Herford because Bindrim had written about "peak experiences" and because of the character's style of talking to people. Therefore, defendant could not have been harmed by the above testimony.

Mitchell also objects that the court erroneously prohibited evidence that plaintiff once had sexual intercourse with a participant. This was irrelevant as to whether plaintiff was libeled by other inaccurate portrayals of his language and his conduct.

Appellant Mitchell alleged that she and Doubleday were joint tortfeasors and any judgment against them had to be joint and several. Contributing wrongdoers, whether joint, concurrent or successive tortfeasors are ordinarily jointly and severally liable for the entire damage. (*Gray v. Sutherland* (1954) 124 Cal.App.2d 280.) When they are joined in an action it is improper to apportion compensating damage among them; judgment for the full amount should be rendered against each. (*Oldham v. Aetna Ins. Co.* (1936) 17 Cal.App. 2d 144.) Courts have resolved inconsistencies by the determination of the jury's intention from an examination of the verdict. (*Snogdrass v. Hand* (1934) 220 Cal. 446.) The appellate court will, if possible, make its own correction to uphold the verdict. (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 457.) In the case at bar, the jury's intent was clear from their verdict, and this court will award plaintiff $50,000 as a joint and several award against both defendants, rather than the $25,000 against each of the two defendants as was awarded

by the court. The defendant Doubleday is also liable in $25,000 punitive damages.

The Cross Appeal

Bindrim contends that the trial court erred in striking the damage award on the contract count. We are aware of no authority that a professional person can, by contract or otherwise, prevent one of his patients from reporting the treatment that patient received. Since the whole theory of plaintiff's therapy was that of group encounter, what Mitchell saw done to and by other members of the group was part of her own treatment. She was free to report what went on. The limits to her right to report were those involved in the libel counts. Plaintiff has no separate cause of action for the mere reporting.

In addition, although plaintiff testified in broad language that he had been damaged by the publication of the book, it is not clear how much, if any, of that damaged flowed from the inaccuracies in the book as distinguished from the fact that his encounter therapy had been given publicity. On this record, we cannot say that the trial court erred.

Finally, cross-appellant Bindrim argues that the reduction on the compensatory damage amount against Mitchell on the libel count should be restored. The judge reduced the verdict against Mitchell from $38,000 to $25,000 on the ground that there was no evidence that the publication of the libel to Mrs. Hoover caused any damage. We agree with the court's determination that Mrs. Hoover was fully aware of what actually happened at the session, and therefore that plaintiff could not have been damaged by any publication to her.

Cross-respondents argue that the compensatory damages should be reduced to a total of $25,000 against both defendants. Judge Wells entered a judgment in the sum of $50,000, by charging each defendant $25,000. The jury's verdict should be reconciled when possible. (*Maheu v. Hughes Tool Co.* (1977), *supra*, 569 F.2d 459.) Insofar as the defendants are jointly and severally liable as joint or successive tortfeasors, we enter a $50,000 compensatory damage verdict against both defendants, for which they are jointly or severally liable.

Plaintiff's cross-appeal on the issue of punitive damages is well taken and the $25,000 award of punitive damages by the jury against Doubleday should stand. The jury had discretion not to award punitive damages against one of the defendants, since as we have said before, the greater wealth of one defendant is relevant.

The judgment, as modified on the motion for a new trial, is further modified as follows:

(1) By substituting for separate judgments against defendants Mitchell and Doubleday a joint and several judgment against both of said defendants in the amount of $50,000; and

(2) By including in said judgment a separate judgment against Doubleday of $25,000 for punitive damages.

Otherwise the judgment is affirmed. Neither party shall recover costs on appeal.

CERTIFIED FOR PUBLICATION

Kingsley, *J.*

Jefferson (Bernard), *J.*

Although I agree with the majority opinion authored by Justice Kingsley, I am writing a separate concurring opinion in order to comment upon the dissenting opinion. The dissent erroneously describes the majority holding as creating a cause of action for libel out of a work of fiction that attacks the techniques of "nude encounter therapy." Because of this misconception with respect to the majority's holding, the dissent reaches the conclusion that the majority's view "poses a grave threat to any future work of fiction which explores the effect of techniques claimed to have curative value."

Had the defendant author of the work of fiction limited her novel to a truthful or fictional description of the techniques employed in nude encounter therapy, I would agree with the dissent that plaintiff had no cause of action for defamation. But here we have a description of a therapist as using insulting and vulgar language of the rankest sort in addressing his patients. Apparently the dissent does not consider that such language is capable of being considered defamatory of plaintiff in his professional role of a therapist practicing nude encounter therapy. The vulgarity purportedly used by the therapist in the novel would necessarily be considered by numerous persons as completely unprofessional and defamatory if used by a professional therapist such as the plaintiff. I fail to see how any jury or any court could consider such crude vulgarity as *not* defaming a professional therapist to whom such vulgarity was attributed in the practice of his profession. I need not repeat this language here as it is set forth in the majority opinion.

" 'The code definition of libel is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a

person's reputation, either generally, or *with respect to his occupation.*' " (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546.) (Emphasis added.)

The dissent concludes that the "average reader" would not have considered plaintiff defamed as a professional therapist who used the crude and vulgar language. But the dissent does not tell us what constitutes an "average reader." I assume that novels are read by the learned, the not so learned, and persons in all walks of life. It is my view that any reader of the novel, whether familiar with a professional therapist's practices or not, might well conclude that a therapist described in the novel was a lewd and dissolute character in the practice of his profession. As indicated in *MacLeod,* a "publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." (*MacLeod, supra,* 52 Cal.2d 536, 547.)

The case at bench is not like that of *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 14, in which the court emphasized that "[*n*]*o reader*" could have thought that a newspaper which reported words of speakers were charging a developer with the commission of a crime in using the phrase "blackmail," and that, on the contrary, "*even the most careless reader* must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet . . . ." (*Id.* at p. 14.) (Emphasis added.) The *Greenbelt* court seems to place all readers—careful and careless alike—as average readers.

The dissent finds error in the instruction given the jury on the issue of identification. The use of the

word "reasoning" in the instruction dissipates the dissent's view that only one person was required to understand the defamatory meaning. If one person "reasonably" understood the defamatory character of the language used, it describes what readers generally would "reasonably" understand. I see no basis for the dissent's view that the instruction had the result of mulcting defendants for the exercise of their first amendment right to comment on the nude marathon. The first amendment right to comment does *not* include the right to commit libel.

The dissent sees in the majority opinion a branding of a novel as libelous because it is critical of an occupational practice. This is a distortion of the majority's position. The position of the majority is simply to refuse to permit a writer and publisher to libel a person and hide under the banner of having written only fictional material. "Of course the fictional setting does not insure immunity when a reasonable man would understand that the fictional character was a portrayal of the plaintiff. 'Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction or in jest.' " (*Middlebrooks v. Curtis Publishing Company* (1969) 413 F.2d 141, 143.)

Jefferson (Bernard), *J.*

Files, *P.J.* (dissenting)

This novel, which is presented to its readers as a work of fiction, contains a portrayal of nude encounter therapy, and its tragic effect upon an apparently happy and well-adjusted woman who subjected herself to it. Plaintiff is a practitioner of this kind of therapy. His grievance, as described in his testimony and in

his briefs on appeal, is provoked by that institutional criticism.[1] Plaintiff's "concession" that he is a public figure appears to be a tactic to enhance his argument that any unflattering portrayal of this kind of therapy defames him.

The decision of the majority upholding a substantial award of damages against the author and publisher poses a grave threat to any future work of fiction which explores the effect of techniques claimed to have curative value.

The majority opinion rests upon a number of misconceptions of the record and the law of libel. I mention a few of them.

Defamation.

Libel is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided or which has a tendency to injure him in his reputation. (Civ. Code, § 45.) A libel which is defamatory without the necessity of explanatory matter is said to be a libel on its face. Language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a result thereof. (Civ. Code, § 45a.)

---

[1]The record demonstrates the essential truth of the author's thesis. A tape recording of an actual encounter session conducted by plaintiff contains this admonition to the departing patients:

> ". . . . Now, to top that off, you're turned on, that is you're about as turned on as if you've had 50 or 75 gammas of LSD. That's the estimate of the degree of the turn-on is. And it doesn't feel that way, because you're [*sic*] been getting higher a little bit at a time. So don't wait to find out, take my word for it, and drive like you've had three or four martinis. Drive cautiously."

Whether or not matter is on its face reasonably susceptible of a libelous meaning is a question of law. (*McLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546.)

The complaint in this action quotes verbatim the portions of the defendant's novel which are alleged to be libelous. No explanatory matter or special damages are alleged. The only arguably defamatory matter I can find in that complaint is in the passages which portray the fictional therapist using coarse, vulgar and insulting language in addressing his patients. Some of the therapeutic techniques described in the quoted passages may seem bizarre, but a court cannot assume that such conduct is so inappropriate that a reputable therapist would be defamed if that technique were imputed to him. The alleged defamation therefore is limited to the imputation of vulgar speech and insulting manners.

The defendants asked the trial court to give an instruction to the jury identifying the matter which it could consider as defamatory. The trial court refused. Instead, the court sent the case to the jury without distinction between actionable defamation and constitutionally protected criticism. In addition, the trial court's instructions authorized the jury to award special damages for loss of income which could have resulted from the lawful expression of opinion.

Identification.

Whether or not an allegedly defamatory communication was made "of and concerning the plaintiff" is an issue involving constitutional rights. (*New York Times v. Sullivan* (1964) 376 U.S. 254, 288; see Rest. Torts, 2d, § 580A Com. (g).) Criticism of an

institution, profession or technique is protected by the First Amendment; and such criticism may not be suppressed merely because it may reflect adversely upon someone who cherishes the institution or is a part of it.

Defendants' novel describes a fictitious therapist who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession.

Indeed the fictitious Dr. Herford has none of the characteristics of plaintiff except that Dr. Herford practices nude encounter therapy. Only three witnesses, other than plaintiff himself, testified that they "recognized" plaintiff as the fictitious Dr. Herford. All three of those witnesses had participated in or observed one of plaintiff's nude marathons. The only characteristic mentioned by any of the three witnesses as identifying plaintiff was the therapy practiced.

Plaintiff was cross-examined in detail about what he saw that identified him in the novel. Every answer he gave on this subject referred to how the fictitious Dr. Herford dealt with his patients. (See Appendix C to Opening Brief of Mitchell.)

Plaintiff has no monopoly upon the encounter therapy which he calls "nude marathon." Witnesses testified without contradiction that other professionals use something of this kind. There does not appear to be any reason why anyone could not conduct a "marathon" using the style if not the full substance of plaintiff's practices.

Plaintiff's brief discusses the therapeutic practices of the fictitious Dr. Herford in two categories: Those practices which are similar to plaintiff's technique are classified as identifying. Those which are unlike plain-

tiff's are called libelous because they are false. Plaintiff has thus resurrected the spurious logic which Professor Kalven found in the position of the plaintiff in *New York Times v. Sullivan, supra,* 376 U.S. 254. Kalven wrote: "There is revealed a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place. . . ." Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 The Supreme Court Review 191, 199.

Even if we accept the plaintiff's thesis that criticism of nude encounter therapy may be interpreted as libel of one practitioner, the evidence does not support a finding in favor of plaintiff.

Whether or not a publication to the general public is defamatory is "whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory." (*Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 765. See *Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 682; Rest. Torts, 2d, § 559, comment (e).)

The majority opinion contains this juxtaposition of ideas: "Secondly, defendants' [proposed] instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim (CT 173, 171,) was properly refused. For the tort of defamation, publication to one other person is sufficient, *supra.*"

The first sentence refers to the question whether the publication was defamatory of plaintiff. The second refers to whether the defamatory matter was published. The former is an issue in this case. The latter is not. Of course, a publication to one person may constitute actionable libel. But this has no bearing on the principle that the allegedly libelous effect of a publication to the public generally is to be tested by the impression made on the average reader.

The jury instruction on identification.

The only instruction given the jury on the issue of identification stated that plaintiff had the burden of proving "That a third person read the statement and reasonably understood the defamatory meaning and that the statement applied to plaintiff."

That instruction was erroneous and prejudicial in that it only required proof that one "third person" understood the defamatory meaning.

The word "applied" was most unfortunate in the context of this instruction. The novel was about nude encounter therapy. Plaintiff practiced nude encounter therapy. Of course the novel "applied to plaintiff," particularly insofar as it exposed what may result from such therapy. This instruction invited the jury to adopt plaintiff's basis contention that "whoever attacks nude encounter therapy wounds me." The effect is to mulct the defendants for the exercise of their first amendment right to comment on the nude marathon.

Malice.

The majority opinion adopts the position that actual malice may be inferred from the fact that the book was "false." That inference is permissible against a defendant who has purported to state the truth. But

when the publication purports to be fiction, it is absurd to infer malice because the fiction is false.

As the majority agrees, a public figure may not recover damages for libel unless "actual malice" is shown. Sufficiency of the evidence on this issue is another constitutional issue. (St. *Amant v. Thompson* (1968) 390 U.S. 727, 730.) Actual malice is a state of mind, even though it often can be proven only by circumstantial evidence. The only apparent purpose of the defendants was to write and publish a novel. There is not the slightest evidence of any intent on the part of either to harm plaintiff. No purpose for wanting to harm him has been suggested.

The majority opinion seems to say malice is proved by Doubleday's continuing to publish the novel after receiving a letter from an attorney (not plaintiff's present attorney) which demanded that Doubleday discontinue publication "for the reasons stated in" a letter addressed to Gwen Davis. An examination of the latter demonstrates the fallacy of that inference.

The letter to Davis [Mitchell] asserted that the book violated a confidential relationship, invaded plaintiff's privacy, libelled him and violated a "common law copyright" by "using the unpublished words" of plaintiff. It added "From your said [television] appearances, as well as from the book, it is unmistakable that the 'Simon Hereford' mentioned in your book refers to my client."

The letters did not assert that any statement of purported fact in the book was false. The only allegation of falsity was this:

> "In these [television] appearances you stated, directly or indirectly, that nude encounter work-

shops, similar to the one you attended, are harmful. The truth is that those attending my client's workshops derive substantial benefit from their attendance at such workshops."

These letters gave Doubleday no factual information which would indicate that the book libelled plaintiff.

The letters did not put Doubleday on notice of anything except that plaintiff was distressed by the expression of an opinion unfavorable to nude encounter therapy—an expression protected by the First Amendment. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339; *Gregory v. McDonnel Douglas Corp.* (1976) 17 Cal.3d 596, 600.)

From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is "false," i.e., fiction; and infers "actual malice" from the fact that the author and publisher knew it was not a true representation of plaintiff. From a constitutional standpoint the vice is the chilling effect upon the publisher of any novel critical of any occupational practice, inviting litigation on the theory "when you criticize my occupation, you libel me."

I would reverse the judgment.

Files, *P. J.*

APPENDIX B.

Orders Modifying Opinions and Order Denying Rehearing.

Certified for Publication

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Paul Bindrim, Plaintiff, Respondent and Cross-Appellant, v. Gwen Davis Mitchell, Defendants, Appellants and Cross-Defendants. 2 Civ. No. 52133 (Super. Ct. No. WE-C-24045).

Filed: May 7, 1979.

Good cause appearing:

(1) The opinion of Mr. Justice Kingsley in the above entitled case, filed on April 18, 1979, is hereby modified as follows:

(a) On page 4 of the Xerox opinion, in the third line of the fourth paragraph on said page, delete the word "Mitchell" and substitute the word "Bindrim";

(b) On page 8 of said Xerox opinion, in the fourth to sixth lines of the second full paragraph on said page, delete the words "and had transcripts of actual conversations between plaintiff and the participants";

(c) On page 12 of said opinion, in the fifth line on said page, delete the word "jury" and substitute the words "trial court";

(d) On page 14 of said opinion, in the sixth line from the bottom on said page, delete the word "defendant's" and substitute the word "plaintiff's";

(e) On page 21 of said opinion, in the third line from the bottom on said page, delete the word "convicting" and substitute the word "convincing."

(2) In the opinion of Mr. Justice Jefferson, filed on said date, on page 31 of said opinion, in the second line from the bottom, delete the word "reasoning" and substitute the word "reasonably."

(3) The petition for rehearing, and the supplement to said petition, filed by defendants and appellants, is hereby denied.

Kingsley, *J.*; Jefferson (Bernard), *J.*

(1) I would grant a rehearing.

(2) My dissenting opinion is hereby modified by deleting the sentence which commences in the next to the last line on page 38 of said opinion and substituting the following: "This instruction invited the jury to find that plaintiff was libeled by criticism of the kind of therapy he practiced."

Files, *P. J.*

APPENDIX C.

Order Denying Hearing After Judgment by the Court of Appeal, 2d District, Division 4, Civil No. 52133.

In the Supreme Court of the State of California, in Bank.

Bindrum v. Mitchell et al.

Filed: July 12, 1979.

Appellants' petition for hearing DENIED.

/s/ Tobriner, Acting *Chief Justice*

APPENDIX D.

Order on Defendants' Motions for Judgment Notwithstanding the Verdict, for New Trial, and to Retax Costs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES.

PAUL BINDRIM, Plaintiff, vs. GWEN MITCHELL, etc., et al., Defendants. NO. WEB 24045.
Filed Mar. 29, 1977.

The above entitled matters having been submitted for decision on March 23, 1977, Defendants' motion for judgment notwithstanding the verdict is hereby denied.

Pursuant to the Stipulation re Revised Memorandum of Costs, filed March 9, 1977, the Court finds that the correct amount of prejudgment costs and disbursements recoverable by Plaintiff is in the sum of $2,468.71.

Defendants' motion for new trial is granted on the grounds of excessive damages and insufficiency of the evidence to justify the verdicts. After weighing the evidence, the Court is convinced from the entire record, including reasonable inference therefrom, that the jury should have reached different verdicts. This order granting a new trial is subject to the condition that the motion of Defendant MITCHELL for new trial is denied if within ten (10) days Plaintiff files a written consent to a reduction in the verdicts against said Defendant in the amount of $13,000 on the cause of action for libel and $12,000 on the cause of action for breach of contracts, and in the judgment against Defendant MITCHELL from $50,000 to $25,000,

which amounts the Court, in its independent judgment, determines from the evidence to be fair and reasonable.

The motion of Defendant DOUBLEDAY for a new trial is granted, subject to the condition that the motion is denied if within ten (10) days Plaintiff files a written consent to a reduction in said verdict in the amount of $25,000, consisting of the jury's award of punitive damages, and a reduction in the total judgment against Defendant DOUBLEDAY from $50,000 to $25,000, which reduction the Court, in its independent judgment, determines from the evidence to be fair and reasonable.

On the causes of action for libel, the evidence does not support a different verdict for compensatory damages against the two defendants. All of the evidence of compensatory damages related to damages caused by the publication of "Touching" by Defendant DOUBLEDAY. There was no evidence of any such damages caused by Defendant MITCHELL'S showing the manucript to Mrs. Hoover. Under the instructions, therefore, the jury could not properly find different compensatory damages against the two defendants on this cause of action. Since the compensatory damages of $25,000 found against Defendant DOUBLEDAY would necessarily apply to Defendant MITCHELL, a reduction to this amount against Defendant MITCHELL is supported by the evidence.

Nor does the evidence support the award of punitive damages against the Defendant DOUBLEDAY. The only possible evidence on which the jury could award the $25,000 punitive damages against DOUBLEDAY, and none against MRS. MITCHELL, would be that DOUBLEDAY'S fault and wealth were greater. But

the evidence does not support a finding that DOUBLEDAY'S fault was greater; it was slight, compared to MRS. MITCHELL'S. The only evidence of DOUBLEDAY'S fault or recklessness which would support an award of punitive damages was the testimony of KENNETH McCORMICK, who was the book's editor at DOUBLEDAY. The extent of his knowledge was that MRS. MITCHELL had attended an encounter session in Southern California, although MRS. MITCHELL advised him that the book was not based on any actual person. No one at DOUBLEDAY made any attempt to discover Plaintiff's or SIMON HERFORD'S identity, or contact him or check the book with him. This is insufficient evidence for the jury to find "oppression, fraud or malice" as required by Plaintiff's Jury Instruction No. 1; or to find that McCORMICK acted "in reckless disregard of [the possible] result" of the book's publication. Especially is this true in view of the fact that the jury found MRS. MITCHELL, the author, *not* liable for any punitive damages. Since the jury did not even award *token* punitive damages against MRS. MITCHELL, who had wealth of $165,000 in community property, it apparently found no fault or malice attributable to her. The mere fact that the evidence showed DOUBLEDAY'S great wealth does not support the $25,000 punitive damage award against it.

Finally, there is no evidence to support an award against Defendant MRS. MITCHELL on the cause of action for breach of contract. This cause of action was based on paragraph 13 of Exhibit 33, wherein MRS. MITCHELL promised that she would not "write articles, or in any manner disclose who has attended the workshop or what has transpired". Although there

was ample evidence that MRS. MITCHELL breached this promise, there is no evidence that such breach caused any damages to Plaintiff. Plaintiff's only evidence of damages were that Plaintiff's reputation was damaged and he lost business and was made ill because of the libels, i.e., the *untruths,* in the book, rather than the truths. There was no evidence that the book's disclosure of who attended or what actually transpired damaged Plaintiff in any way.

DATED:

/s/ Richard L. Wells
RICHARD L. WELLS
Judge of the Superior Court

Supreme Court, U. S.
FILED
NOV 6 1979
ROBAK, JR. CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-556

GWEN DAVIS MITCHELL,

Petitioner,

vs.

PAUL BINDRIM,

Respondent.

No. 79-585

DOUBLEDAY & COMPANY, INC.,

Petitioner,

vs.

PAUL BINDRIM,

Respondent.

Brief in Opposition to Petitions of Gwen Davis Mitchell and Doubleday & Company, Inc. for Writs of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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I
Introduction.

The Constitutional Issue—if Any.

An examination of the petitions and of the brief of Amici demonstrates that, in fact, there is but one possible constitutional issue here, namely, whether, under the First Amendment, an author may be held

liable for libel of a living person contained within a work labeled fiction. Amici set that out squarely—petitioners dance around it, but that is the ultimate thrust of their argument.

We discuss this issue, *infra*, section X, but we also address ourselves to a number of issues which, despite the fact that they were appropriate only for the state courts, (where they were raised and decided adversely to petitioners) are raised here by petitioners (and often completely misstate the record).

II
Statement of Facts.

Respondent takes strong issue with the many misleading characterizations of the facts of this case as represented by Petitioners and instead will set forth below the summary of the facts as stated by the Court of Appeal in its opinion:

> "Plaintiff is a licensed clinical psychologist and defendant is an author. Plaintiff used the so-called 'Nude Marathon' in group therapy as a means of helping people to shed their psychological inhibitions with the removal of their clothes.
>
> "Defendant Mitchell had written a successful best seller in 1969 and had set out to write a novel about women of the leisure class. Mitchell attempted to register in plaintiff's nude therapy but he told her he would not permit her to do so if she was going to write about it in a novel. Plaintiff said she was attending the marathon solely for therapeutic reasons and had no intention of writing about the nude marathon. Plaintiff brought to Mitchell's attention paragraph 13 of the written contract which reads as follows:

'The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants.'

"Mitchell reassured plaintiff again she would not write about the session, she paid her money and the next day she executed the agreement and attended the nude marathon.

"Mitchell entered into a contract with Doubleday two months later and was to receive $150,000 advance royalties for her novel.

"Mitchell met Eleanor Hoover for lunch and said she was worried because she had signed a contract and painted a devastating portrait of Bindrim.

"Mitchell told Doubleday executive McCormick that she had attended a marathon session and it was quite a psychological jolt. The novel was published under the name "Touching" and it depicted a nude encounter session in Southern California led by "Dr. Simon Herford"

"Plaintiff first saw the book after its publication and his attorneys sent letters to Doubleday and Mitchell. Nine months later the New American Library published the book in paperback.

"The parallel between the actual nude marathon session and the session in the book 'Touching' was shown to the jury by means of the tape recordings Bindrim had taken of the actual sessons. Plaintiff complains in particular about a portrayed session in which he tried to encourage a minister

to get his wife to attend the nude marathon. Plaintiff alleges he was libeled by the passage below.[1]

Excerpts from "Touching"

Page

126-27

The minister was telling us how the experience had gotten him further back to God,

And all the time he was getting closer to God, he was being moved further away from his wife, who didn't understand, she didn't understand at all. She didn't realize what was coming out of the sensitivity training sessions he was conducting in the church

he felt, he, more than felt, he knew, that if she didn't begin coming to the nude marathons and try to grasp what it was all about, the marriage would be over.

"You better bring her to the next marathon," Simon said.

"I've been trying," said the minister. "I only pray she comes."

"You better do better than pray," said Simon. "You better grab her by the cunt and drag her here."

"I can only try."

"You can do more than try, Alex. You can grab her by the cunt,

"A man with that kind of power, whether it comes from God, or from his own

Transcript of Actual Session

"I've come a little way,"

"I'd like to know about your wife.

She hasn't been to a marathon?"

"No."

"Isn't interested? Has no need?"

"I don't—she did finally say that she would like to go to a standard sensitivity training somewhere. She would be—I can't imagine it."

"Why?"

"Neither could I when I first came.

"Yeh. She might. I don't know."

"It certainly would be a good idea for two reasons: one, the minor one is that you are involved here, and if she were in the same thing, and you could come to some of the couple ones, it would be helpful to you. But more than that, almost a definite recipe for breaking up a marriage is for one person to go into growth groups and sense change and grow . . .

"I know that."

"Boy they sure don't want that, and once they're clear they don't need that mate any-

---

[1]It is worthy of note that petitioners, in reprinting the Court of Appeal's Opinion conspicuously fail to reproduce the side-by-side columnar comparison as printed in both the official and unofficial reports. We can only surmise that this failure is designed to blunt the impact on this Court of this completely crude, gratuitous libel.

Excerpts from "Touching"

manly strength, strength he doesn't know he has, can drag his wife here by the fucking cunt.

"I know," Alex said softly. "I know."

Transcript of Actual Session

more, and they are not very patient."

"But it is true, the more I get open the more the walls are built between us. And it's becoming a fairly intelligent place, a fairly open place doing moderate sensitivity eyeballing stuff with the kids. I use some of these techniques teaching out class work."

"Becoming more involved?"

"Yeh, involved at the same time that I am more separated from. It's a paradox again, isn't it?"

"Mmm."[2]

The book was published in hardcover in January of 1971. Promptly upon becoming aware of it, plaintiff, by counsel, wrote MITCHELL and DOUBLEDAY letters (February 26, 1971) advising them that the book libelled him and demanding that they cease, *inter alia,* further publication and distribution of the book in hard cover or paperback, and specifically advising DOUBLEDAY that "your failure to comply with this demand may subject you to exemplary damages for willful wrongful conduct."

DOUBLEDAY's sole action in response to plaintiff's demand letter was to "contact MRS. MITCHELL in California and receive a *third* assurance from her that the characters in "TOUCHING" were fictional and did not resemble any living person". (Doubleday Petition, Pg. 9. Emphasis Doubleday's.)

Nine months later the novel was republished in paperback by NEW AMERICAN LIBRARY under license from DOUBLEDAY.

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[2]We set out below, *Section VIII infra,* some of the other libels on plaintiff.

Plaintiff brought suit and the jury returned verdicts on the libel counts against DOUBLEDAY and MITCHELL and a verdict of $25,000 punitive damages against DOUBLEDAY. The District Court of Appeal affirmed and modified the jury verdict by entering a joint and several judgment against MITCHELL and DOUBLEDAY in the amount of $50,000 for compensatory damages and by restoring the jury's verdict (stricken by the trial judge) against DOUBLEDAY of $25,000 for punitive damages. Defendants' Petition for a Rehearing in the Court of Appeal was denied on May 7, 1979, and on July 12, 1979, the California Supreme Court denied a hearing without dissent.

III

The Court of Appeal Found, as Had the Jury, That There Was "Overwhelming Evidence" That Plaintiff and the Character in Defendants' Book "Were One".

The extent of the Court of Appeal's independent review of the record is amply demonstrated by its close examination of the side-by-side comparison of defendants' book and the actual events which were depicted and distorted in the book (See Appendix B attached hereto, Pl. Ex. 45 R. 125) and of the clear identification by several witnesses of plaintiff as Herford.[3]

---

[3]Mitchell's italicized assertion that "much stronger evidence of recognizability—six witnesses who were not insiders, coupled with a measure of belief and what the Supreme Court of Alabama considered to be 'common knowledge'—was considered totally inadequate to support a jury verdict by this Court in *New York Times v. Sullivan* (376 U.S. at 288-289)" entirely misconceives this Court's opinion on that score. This Court there pointed out ". . . it is plain that these statements [in the advertisement] could not reasonably be read as accusing

As the Court pointed out after its full examination of the record "the only differences between plaintiff and the Herford character in 'Touching' were physical appearance and that Herford was a psychiatrist rather than a psychologist. Otherwise, the character Simon Herford was very similar to the actual plaintiff. . . . the similiarities between Herford and Bindrim are clear, and the transcripts of the actual encounter weekend show a close parallel between the narrative of plaintiff's novel and the actual real life events." 92 Cal.App.3d at 76, 155 Cal.Rptr. at 37-38.

The Court of Appeal was fully aware of its "duty to examine the record to determine whether it could constitutionally support a judgment in favor of plaintiff." 92 Cal.App.3d at 72, 155 Cal.Rptr. at 35. It did so carefully and concluded:

> "Here there were many similarities between the character, Herford, and the plaintiff, Bindrim and those few differences do not bring the case under the rule of *Middlebrooks.* (See *Fetler v. Houghton Mifflin Co.,* 2 Cir. (1966) 364 F. 2d 650.) *There is overwhelming evidence that plaintiff*

---

respondent of personal involvement in the acts in question" (376 U.S. at 288-289) and that the witnesses' identification testimony was based "solely on the unsupported assumption that because of his official position, he must have been" involved in the activities charged in the advertisement. (*Id.* at 289).

Here on the contrary, the witnesses were clear that, based upon what was written by Mitchell, Herford was Bindrim, and that a psychologist would recognize plaintiff as "Simon Herford" even if he did not know plaintiff personally (R.T. 415) and, indeed, Mitchell herself told a friend she was afraid Bindrim would sue her because she had painted "a devastating portrait" of him. (R.T. 445.) The Court of Appeal properly concluded "The test is whether a reasonable person reading the book would understand that the fictional character therein pictured was in actual fact, the plaintiff acting as described." 92 Cal. App.3d at 78, 155 Cal.Rptr. at 39.

and 'Herford' were one." 92 Cal.App.3d at 76, 155 Cal.Rptr. at 38 (emphasis added).

The record more than adequately bears out the jury's finding and the Court of Appeal's agreement in that finding.

IV

The California District Court of Appeal Conducted a Thorough, Independent Review of the Record and Found That the Evidence Constitutionally Supported the Judgment.

Based upon the principles articulated by this Court, the California District Court of Appeal noted its duty of independent review in public figure libel cases (the plaintiff having stipulated that for purposes of this case he was a "public figure") and undertook a painstaking examination of the record. 92 Cal.App.3d 61, 72, 155 Cal.Rptr. 29, 35. The Court of Appeal took express note of the difficult constitutional standards imposed by *New York Times v. Sullivan,* and its progency on a public figure libel plaintiff and concurred with the jury that "Doubleday had actual malice when it permitted the paperback reprinting of *Touching* . . . ." 92 Cal.App.3d at 72, 155 Cal.Rptr. at 35.

The Court of Appeal carefully pointed out that "there was no actual malice on the part of Doubleday in its original printing of the hardback edition" because "plaintiff failed to prove by clear and unconvincing evidence that the original paperback publication was made with knowledge of falsity or in reckless disregard of falsity" (*Id.* at 73, 155 Cal.Rptr. at 36).[4]

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[4]The Court's holding in this respect clearly demonstrated its strict application of the *New York Times* rule, for the evidence at trial showed that before the hardback publication Mitchell told Doubleday (1) that she had attended a nude

However the Court of Appeal did find that "there is clear and convincing evidence to support the jury's finding . . . that defendant Doubleday had actual malice when it permitted the paperback printing of *Touching* (*Id.* at 72, 155 Cal.Rptr. at 35) after receipt of a letter from plaintiff's attorney putting it on notice of the libel and demanding that Doubleday cease exploitation of the paperbook rights, for the jury could have inferred that at this point Doubleday either had serious doubts, or should have had serious doubts, as to the possibility that plaintiff was defamed by *'Touching'* and that at that point Doubleday had some duty to investigate" (*Id.* at 74, 155 Cal.Rptr. at 36).

There could be no clearer evidence of the meticulous examination of the record made by the Court of Appeal and of its scrupulous adherence to the constitutional standard set down by the Court in *New York Times v. Sullivan,* and the cases which have followed it.

V

The Record Is Clear That Mitchell Had Actual Knowledge That Her Libels of Plaintiff Were False.

As the Court of Appeal pointed out

> "There is clear and convincing evidence to support the jury's finding that defendant Mitchell entertained actual malice . . . ."

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encounter session, so that her depiction in *Touching* would be true to life (R. 527-28), 2) that the session had taken place in Southern California over a weekend (R. 529) (as in *Touching*), 3) and that she had received a "psychological jolt" from the session and had been "emotionally disturbed" by it, (R. 529) and 4) Doubleday received a manuscript from Mitchell centered around a nude encounter session in Southern California over a weekend, which painted a devastating and vitriolic portrait of the encounter group's psychologist and proceeded to publish it. Nevertheless, the Court held that even this glaring evidence was insufficient to meet the "clear and convincing" standard of "actual malice" under *New York Times.*

"Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. Since she attended sessions there can be no suggestion that she did not know the true facts." 92 Cal.App.3d at 72-73, 155 Cal.Rptr. at 35.

Moreover, the Court of Appeal specifically found that Mitchell told her friend Eleanor Hoover that "she was worried because she had . . . painted a devastating portrait of Bindrim." 92 Cal.App.3d at 69, 155 Cal.Rptr. at 33-34.

The Court of Appeal was fully conversant with the applicable law which this Court has set out in *New York Times* and since then, and went on:

Since "actual malice" concentrates solely on defendants' attitude toward the truth or falsity of the material published (citing cases) and not on malicious motives, certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity." *Id.* at 73, 155 Cal.Rptr. at 35-36.

VI

The Court of Appeal Found and the Record Is Replete With Evidence That Doubleday Acted With "Actual Malice".

DOUBLEDAY candidly admits that, after being put on notice by plaintiff that the book libeled him, it did absolutely nothing other than to ask the author for the third time whether any character in the book was recognizable. This complete lack of response despite

the fact that (as we have pointed out in Section IV, footnote 4, *supra*):

1. The author had originally told DOUBLEDAY's editor that (a) she attended a nude encounter session so that the depiction in "TOUCHING" would be true to life (R.T. 527-28); (b) the session she attended took place in Southern California over the course of a weekend. (R.T. 529). ("TOUCHING" depicts a nude encounter session occurring in Southern California over a weekend); and (c) that she had received "quite a psychological jolt" from the session and was "emotionally disturbed" by the experience. (R.T. 529).

2. Immediately after the publication of the hardcover edition DOUBLEDAY received a formal demand letter from plaintiff's attorneys (a) putting DOUBLEDAY on notice that plaintiff, a prominent psychologist in this area of psychotherapy, was libeled by the publication of the book; and (b) instructing DOUBLEDAY to cease all further publication and distribution of the hardcover edition and to cease exploitation of the paperback rights (Pl. Exs. 35 and 36, R. 123). This demand letter specifically indicated to DOUBLEDAY that "your failure to comply with this demand may subject you to exemplary damages for willful wrongful conduct."

The fact is, as DOUBLEDAY admits, that outside of its inquiry of its author, *DOUBLEDAY did absolutely nothing to attempt* to find out if, in fact, plaintiff could be recognized as Herford and, if so, whether any parts of the book libeled him. DOUBLEDAY did not even take the simple expedient of asking plain-

tiff, through his counsel, for supporting extrinsic evidence of his claim which would have produced not only the tape recording of the actual session[5] but also the voluminous evidence of plaintiff's position as the virtual originator and leading exponent of the nude encounter marathon as a developing mode of psychotherapy and his wide recognition in the field, as well as the evidence of libels set forth below (Section VIII) and as set out in Appendix B. Similarly, Doubleday made no attempt to ascertain *from even the author,* let alone the plaintiff, the identity of the other people who had attended the encounter in order to attempt to ascertain from them whether in fact Herford was recognizable as Bindrim; whether the encounter portrayed in the book was recognizable as the very one they had attended; and whether, if Herford was Bindrim, anything in the book was a false and derogatory portrayal of Bindrim.

Doubleday makes the completely unsupported assertion that "it had scrupulously complied with all established industry practices for guarding against publication of defamatory material" in the face of a record naked as a jaybird of any such evidence and, indeed, with testimony to the exact contrary by Doubleday's own witness.

Doubleday introduced no testimony whatever of "established industry practice" in this or any other respect. Doubleday did call Robert Gutwillig as an expert witness on "how authors customarily go about writing fiction". (R.T. 568). Mr. Gutwillig is an "editor and writer" (R.T. 566) who "for the last 20 years"

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[5]Doubleday persists in asserting that there were "no extrinsic materials for it to inspect." (Petitioner Doubleday p. 24). What better "extrinsic material" could there be than the tape recording of the actual session?

has "been engaged in publishing journalism and managing companies that are engaged in publishing" (R.T. 566). At the time of the trial he was "the West Coast editor of Summit Books" (R.T. 567) and is obviously familiar with "established industry practices for guarding against publication of defamatory material". Mr. Gutwillig's testimony on this score is summarized in his agreement without qualifications on cross-examination that the matter of determining whether a fictional character in a novel was indeed a representation of an actual person *"is not one that can be resolved simply by the expedient of asking the author and stopping there."* (R.T. 577—our emphasis).

DOUBLEDAY'S protestations of having done everything it could and of having no extrinsic facts to verify plaintiff's claims of libel are directly contradicted by all the evidence. Accordingly, the Court of Appeal, after its independent review of the record, correctly concluded that the evidence was clear and convincing that DOUBLEDAY had acted with "actual malice".[6]

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[6]We wish to call the Court's attention to an egregious and impermissible violation not merely of this Court's Rule 40(2), but of a basic principle involved in any appeal: The reason for Doubleday's failure to comply with this rule with regard to "Exhibit 2" of its petition is simple—that "Exhibit" is not a part of the record below, nor was it ever even offered into evidence!

Our reference to this "Exhibit" in no way represents acquiescence on our part to its presence before this Court. It has no place here and should be disregarded. We nevertheless point out that this "Exhibit" purports to be a license from Doubleday to the paperback publisher which, on its face, discloses that the right to publish in paperback *did not accrue and could not be exercised until nearly ten months after receipt by Doubleday of plaintiff's notice that he had been libeled!* Even assuming *arguendo* the authenticity of this purported "Exhibit", this "Exhibit" only re-enforces the Court of Appeal's finding that "Doubleday had actual malice when it permitted the paperback printing of 'Touching' . . ." 92 Cal.App.3d at 72, 155 Cal.Rptr. at 35.

VII

Doubleday Has Had a Full and Considered Hearing at Trial and on Appeal With Regard to the Paperback Publication.

Petitioner DOUBLEDAY argues disingenuously that it has never had an opportunity to be heard on the issue of its authorizing republication of the libel in paperback. This is simply not true. In fact, DOUBLEDAY litigated this issue at trial and has consistently and loudly argued in its briefs below that no liability for the paperback republication should attach to it because DOUBLEDAY had no duty whatsoever to investigate the plaintiff's claim of libel beyond its perfunctory inquiry of its author. After having energetically but unsuccessfully litigated at trial and argued this proposition to the Court of Appeal and to the California Supreme Court, DOUBLEDAY now maintains to this Court that it had no opportunity to be heard on that issue.

This preposterous and incredible contention although clearly belied by the record of the trial and the briefs and argument of all parties on appeal was asserted by DOUBLEDAY in its Petition for Rehearing to the Court of Appeal and in its Petition for Hearing in the California Supreme Court, and rejected by both courts.

1. Even before suit was started plaintiff's attorney wrote DOUBLEDAY on February 26, 1971 putting DOUBLEDAY on notice and specifically warning that no paperback republication occur (Pl. Exs. 35 and 36). DOUBLEDAY responded on March 8, 1971 (Pl. Ex. 37).

2. The foregoing letters were put in evidence (R.T. 123).

3. The paperback edition itself showing publication approximately nine or ten months after plaintiff's attorney's letter to DOUBLEDAY was put into evidence (Pl. Ex. 8 R.T. 38) without objection.

4. One of plaintiff's witnesses testified that he had read the paperback edition, had recognized Herford to be Bindrim and had understood the disparaging portrayal therein contained.

5. *Defendants'* Memorandum in Support of Motion for Judgment N.O.V. and New Trial (C.T. 192, lines 2-8):

> "With regard to plaintiff's contention that licensing the paperback after plaintiff's attorneys' claim letter evidenced malice, DOUBLEDAY's response to that letter demonstrates that it duly considered and investigated the claim, considered it in the light of the law applicable to identification of characters in fiction (Trial Memo, pp. 4-18), and respectfully and honestly disagreed with the claim."

6. *Defendant Mitchell's* Opening Brief to District Court of Appeal at page 15:

> "With regard to Bindrim's contention that licensing the paperback after his attorneys' claim letter evidenced malice, Doubleday's response to that letter demonstrates that it duly considered and investigated the claim, considered it in the light of the law applicable to identification of characters in fiction (see Part Two, Section B below), and respectfully and honestly disagreed with the claim."

7. *Doubleday's* Reply Brief in the District Court of Appeal at page 11:

> "Finally, the plaintiff asserts that Doubleday's sale of the paperback rights in *TOUCHING*, after Bindrim had complained that he was 'Herford', constituted reckless disregard."

Contrary to Doubleday's assertion, the claim arising out of the publication of the paperback was fully presented at trial, briefed and argued to the Court of Appeal by all parties, including Doubleday. Doubleday's claimed absence of hearing is without the slightest substance.[7]

VIII

The Jury and the Court of Appeal Found That the Gross Distortion of Actual Events to Paint a False, Devastating and Disparaging Picture of Plaintiff Was Not a Mere Expression of "Opinion".

Petitioners argue that passages alleged by plaintiff to be untrue "are descriptions which, read in context, are no more than the author's opinions. . . ." Mitchell's Petition, p. 12.

We call attention to one such "description" set out in the District Court of Appeal's Opinion (92 Cal. App.3d at 70, 155 Cal.Rptr. at 34): (pg. 3-5):

> "Plaintiff complains in particular about a portrayed session in which he tried to encourage a minister to get his wife to attend the nude marathon. Plaintiff alleges he was libeled by the passage below."
>
> [Here the Court of Appeal set out the excerpt from the book side by side with the transcript of the actual session, reproduced *supra* at page 4.

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[7]That Doubleday can find no case on this point closer to the facts in this case than those it points to at pages 29-30 of its Petition emphasizes the emptiness of its argument.

> As expressed by Justice Jefferson, in his concurring opinion, we feel we need not repeat that language here.]

The Court of Appeal was clear that "There can be no libel predicated on an opinion. The publication must contain a false statement of fact". 92 Cal.App.3d at 76, 155 Cal.Rptr. at 38.

The Court then noted plaintiff's claim "that the book contained several false statements of fact." It pointed to the depiction of the conversation between the plaintiff and the minister (*supra,* page 4) and went on:

> "Plaintiff also argues that a particular incident in the book is libelous. That incident depicts an encounter group patient as so distressed upon leaving from the weekend therapy that she is killed when her car crashes. Plaintiff also complains of an incident in the book where he is depicted as 'pressing,' 'clutching,' and 'ripping' a patient's cheeks and 'stabbing against a pubic bone.' Plaintiff complains, too, of being depicted as having said to a female patient, 'Drop it, bitch.' There are also other incidents alleged to be libelous." Id. at 76, 155 Cal.Rptr. at 38.

Among these "other incidents" was the attribution to plaintiff, a licensed clinical psychologist, of the practice of addressing his patients as "assholes" (R.T. 201-202); telling his emotionally distraught patients to "shut up and listen" (R.T. 195); ridiculing a male patient in front of others by chiding him about a sexual problem: "wouldn't that be a reason to hang your fucking head . . . did your mama tell you that was a disgusting thing to do?" (R.T. 183-184).

The Court rightly concluded that it was for the jury to determine whether such statements, or any of them, were put forward by Mitchell as expressions of opinion or fact (*Good Government Group of Seal Beach Inc. v. Hogard*, 22 Cal.3d 672, 150 Cal.Rptr. 258 (1978), *cert. denied*, 99 S.Ct. 2406 (1979)) and, the jury having found that a reader, identifying plaintiff as "Herford", would "regard the passages herein complained of" not "as mere fictional embroidering" but "as reporting actual language and conduct", the jury's "verdict adverse to the defendants cannot be overturned". 92 Cal.App.3d at 78, 155 Cal.Rptr. at 39.

IX

The Finding of "Actual Malice" Constitutionally Supports the Punitive Damage Award.

The sole issue before this Court on the propriety of the award of punitive damages is whether the plaintiff has proved "actual malice" on the part of defendant Doubleday. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974); *Maheu v. Hughes*, 569 F.2d 459 (9th Cir. 1977).[8] The Court of Appeal (as is discussed in Section VI, *supra*) so concluded after its meticulous examination of the record. We deem it unnecessary to discuss in detail this aspect of Doubleday's contention in this regard contained at pages 32-35 of its Petition.

Beside a passing reference to *New York Times*, Doubleday rests its argument on punitive damages on

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[8]We do not address Doubleday's claims that the California punitive damage statutes were improperly construed under California law as these arguments have already been rejected by both the District Court of Appeal and the California Supreme Court in this case.

the cases of *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 at 161 (1967).

Neither case supports Doubleday's position in this regard but, rather, both are in complete accord with the opinion of the District Court of Appeal.

In *Cantrell* (a "false light" privacy case), the District Judge struck the plaintiffs' demand for punitive damages and his finding in support of the striking was incorrectly interpreted by the Court of Appeals "to be a determination by the District Judge that there was no evidence of knowing falsity or reckless disregard of the truth introduced at the trial." 419 U.S. at 251. Consequently, this Court came to the "inescapable" conclusion that "the District Judge was referring to the common-law standard of malice rather than the *New York Times* 'actual malice' standard when he dismissed the punitive damages claim." Nothing in *Cantrell* precludes an award of punitive damages so long as "actual malice" in accord with the *New York Times* standard has been established.

Here, the California Court of Appeal's reinstatement of the jury's punitive damage award was based precisely upon the premise that a public figure in a defamation case may be awarded punitive damages when there is "actual malice" under the *New York Times* standard (*Maheu v. Hughes Tool Co.*, (1977) 569 F.2d 459), and, as we have said above, actual malice was established for Doubleday." (92 Cal.App.3d at 74, 155 Cal.Rptr. at 36-37.)

Doubleday similarly misconceives, or shuts its eyes to what this Court said in the *Butts* case. At the very page referred to by Doubleday (388 U.S. at

161) where Doubleday points out that this Court stated "[P]unitive damages require a finding of 'ill will' under general libel law" the Court immediately went on

> "and it is not unjust that a publisher be forced to pay for the 'venting of his spleen' in a manner which does not meet even the minimum standards as required for constitutional protection. . . . We would hold, therefore, that misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury [Doubleday makes no such claim here]. As we have already pointed out, the case on punitive damages was put to the jury under instructions which satisfied the constitutional test we would apply in cases of this kind, and the evidence amply supported the jury's findings."

That is precisely what occurred in this case, as the California Court of Appeal determined from its independent review of the record, which record completely supports that Court's determination with regard to punitive damages.

X

The Petitioners Cannot Insulate Themselves From Liability Simply Because Their Libels Are Cast in the Form of Fiction.

The underlying thrust of Petitioners' argument and the refreshingly open and unequivocal statement of Amici is that there should be no liability whatever when one casts libels in the form of fiction no matter how egregious and no matter how identifiable the vic-

tim, provided only that the name and some of the physical characteristics of the one libeled are changed.

While not quite the position of those who assert or have asserted that there can be *no* libel liability at all under the First Amendment, Petitioners' constitutional argument approaches close to the border of that position. Not only would this proposal abolish the closely circumscribed circumstances which engender liability per *New York Times* and the cases since, but it would shield completely even the most vicious libeller provided only that he or she had applied the rubber stamp of "fiction" to what was spewed out. However, that is not the law under our Constitution and should not be. As the Court of Appeal noted:

> "The position of the majority is simply to refuse to permit a writer and publisher to libel a person and hide under the banner of having written only fictional material. 'Of course the fictional setting does not insure immunity when a reasonable man would understand that the fictional character was a portrayal of the plaintiff. "Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction or in jest." ' (Middlebrooks v. Curtis Publishing Company (4th Cir. 1969) 413 F.2d 141, 143.)" 92 Cal.App.3d at 84, 155 Cal.Rptr. at 42 (Jefferson, J. concurring) *Accord, Fetler v. Houghton Mifflin,* 364 F.2d 650 (2d Cir. 1966).

In passing, we note that we have the highest respect for Amici and the creators whom they represent but we point out that in contributing greatly to the culture of our nation, of their own nations and of the world, Proust, Huxley, Maugham, Kaufman, Ferber,

Mankiewicz and Wells, Ehrlichman (if his was a contribution) and Rintels (to whom Amici refer in their footnote 2) as well as Cervantes (Amici's footnote 1), in drawing upon living persons for purpose of fiction did not base their contributions upon defaming those persons.

Creativity is not inhibited by being required to have a modicum of respect for the rights of others, by the recognition that millions upon millions of people other than authors have a right to live their personal and professional lives in peace and quiet without being subjected to ridicule, contempt, obloquy, distress and damage in the name of "creativity".

Indeed, in the recent case in the field of libel which has been before this Court, *Herbert v. Lando,* 99 S.Ct. 1635 (1979), this Court was dealing with defendants of the same creative character as those represented by Amici. There this Court reaffirmed that the application of the *New York Times* standard affords more than ample protection for the guarantees of the First Amendment:

> "Given the required proof, however, damages liability for defamation abridges neither freedom of speech nor freedom of the press." *Herbert v. Lando,* 99 S.Ct. at 1641.

It is submitted that there is no First Amendment absolute license for unbridled libel simply because it is put in the form of fiction.

XI

Conclusion.

It is respectfully submitted that the Petitions for Writs of Certiorari should be denied.

Dated: November 5, 1979.

Respectfully submitted,

SLAFF, MOSK & RUDMAN,
GEORGE SLAFF,
MARC R. STEIN,

Attorneys for Respondent
Paul Bindrim.

APPENDIX A.

Opinion of the Court of Appeal.

Court of Appeal, Second District, Division 4.
92 Cal.App.3d 61

Paul Bindrim, Plaintiff, Respondent and Cross-Appellant, v. Gwen Davis Mitchell et al., Defendants, Appellants and Cross-Defendants. Civ. 52133.

April 18, 1979.

As Modified on Denial of Rehearing May 7, 1979.

Hearing Denied July 12, 1979.

Lillick, McHose & Charles, Anthony Liebig and Kathleen Hallberg, Los Angeles, for defendant, appellant and cross-defendant Mitchell.

Satterlee & Stephens, Robert M. Callagy, Katherine J. Trager, New York City, Lillick, McHose & Charles, Anthony Liebig and Kathleen Hallberg, Los Angeles, for defendant, appellant and cross-defendant Doubleday.

Slaff, Mosk & Rudman, George Slaff and Marc R. Stein, Los Angeles, for plaintiff, respondent and cross-appellant.

KINGSLEY, Associate Justice.

This is an appeal taken by Doubleday and Gwen Davis Mitchell from a judgment for damages in favor of plaintiff-respondent Paul Bindrim, Ph.D. The jury returned verdicts on the libel counts against Doubeday and Mitchell and on the contract count against Mitchell.

The court denied defendants' motion for judgment NOV and granted a new trial subject to the condition that new trial would be denied if plaintiff would consent to (1) a reduction of the libel verdict against Mitchell from $38,000 to $25,000; (2) a striking of the $25,000 punitive damage award against Doubleday on the libel

count; and (3) a striking of the $12,000 damage award on the contract count against Mitchell.

Plaintiff consented without prejudice on these issues in any appeal to be taken from the judgment. Defendants appealed and plaintiff cross-appealed from the judgment reducing the original jury verdict.

Plaintiff is a licensed clinical psychologist and defendant is an author. Plaintiff used the so-called "Nude Marathon" in group therapy as a means of helping people to shed their psychological inhibitions with the removal of their clothes.

Defendant Mitchell had written a successful best seller in 1969 and had set out to write a novel about women of the leisure class. Mitchell attempted to register in plaintiff's nude therapy but he told her he would not permit her to do so if she was going to write about it in a novel. Plaintiff said she was attending the marathon solely for therapeutic reasons and had no intention of writing about the nude marathon. Plaintiff brought to Mitchell's attention paragraph 13 of the written contract which reads as follows:

> "The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants."

Mitchell reassured plaintiff again she would not write about the session, she paid her money and the next day she executed the agreement and attended the nude marathon.

Mitchell entered into a contract with Doubleday two months later and was to receive $150,000 advance royalties for her novel.

Mitchell met Eleanor Hoover for lunch and said she was worried because she had signed a contract and painted a devastating portrait of Bindrim.

Mitchell told Doubleday executive McCormick that she had attended a marathon session and it was quite a psychological jolt. The novel was published under the name "Touching" and it depicted a nude encounter session in Southern California led by "Dr. Simon Herford."

Plaintiff first saw the book after its publication and his attorneys sent letters to Doubleday and Mitchell. Nine months later the New American Library published the book in paperback.

The parallel between the actual nude marathon sessions and the sessions in the book "Touching" was shown to the jury by means of the tape recordings Bindrim had taken of the actual sessions. Plaintiff complains in particular about a portrayed session in which he tried to encourage a minister to get his wife to attend the nude marathon. Plaintiff alleges he was libeled by the passage below:

Excerpts from "Touching"

Page

126-27

The minister was telling us how the experience had gotten him further back to God,

And all of the time he was getting closer to God, he was being moved further away from his wife, who didn't understand, she didn't understand at all. She didn't realize what was coming out of the sensitivity training sessions he was conducting in the church.

he felt, he more than felt, he knew, that if she didn't begin coming to the nude marathons and try to grasp what it was all about, the marriage would be over.

"You better bring her to the next marathon," Simon said.

"I've been trying," said the minister. "I only pray she comes."

"You better do better than pray," said Simon. "You better grab her by the cunt and drag her here."

"I can only try."

"You can do more than try, Alex. You can grab her by the cunt,

"A man with that kind of power, whether it comes from God or from his own manly strength, strength he doesn't know he has, can drag his wife here by the fucking cunt."

"I know," Alex said softly. "I know."

Transcript of Actual Session

"I've come a little way,"

"I'd like to know about your wife. She hasn't been to a marathon?"

"No."

"Isn't interested? Has no need?"

"I don't—she did finally say that she would like to go to a standard sensitivity training session somewhere. She would be —I can't imagine her in a nude marathon. She can't imagine it."

"Why?"

"Neither could I when I first came."

"Yeh. She might. I don't know."

"It certainly would be a good idea for two reasons: one, the minor one is that you are involved here, and if she were in the same thing, and you could come to some of the couple ones, it would be helpful to you. But more than that, almost a definite recipe for breaking up a marriage is for one person to go into growth groups and sense change and grow . . ."

"I know that."

"Boy they sure don't want that, and once they're clear they don't need that mate anymore, and they are not very patient."

"But it is true, the more I get open the more the walls are built between us. And it's becoming a fairly intelligent place, a fairly open place, doing moderate sensitivity eyeballing stuff with the kids. I use some of these techniques teaching our class work."

"Becoming more involved?"

"Yeh, involved at the same time that I am more separated from. It's a paradox again, isn't it?"

"Mmm."

Plaintiff asserts that he was libeled by the suggestion that he used obscene language which he did not in fact use. Plaintiff also alleges various other libels due to Mitchell's inaccurate portrayal of what actually happened at the marathon. Plaintiff alleges that he was injured in his profession and expert testimony was introduced showing that Mitchell's portrayal of plaintiff was injurious and that plaintiff was identified by certain colleagues as the character in the book, Simon Herford.

I

Defendants first allege that they were entitled to judgment on the ground that there was no showing of "actual malice" by defendants. As a public figure,[1] plaintiff is precluded from recovering damages for a defamatory falsehood relating to him, unless he proved that the statement was made with "actual malice," that is, that it was made with knowledge that it is false or with reckless disregard of whether it was false or not. (*New York Times Co. v. Sullivan* (1964) 376 US. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686.) The cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262.) Thus, what constitutes actual malice focuses on defendants' attitude toward the truth or falsity of the material published and reckless disregard of the truth or falsity cannot be fully encompassed by one

[1]Plaintiff admits, and the evidence shows, that he is a public figure.

infallible definition but its outer limits must be marked by a case-by-case adjudication. (*Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 434, 142 Cal.Rptr. 304.)

Evidence establishing a reckless disregard for the truth must be clear and convincing evidence, and proof by a preponderance of evidence is insufficient. (*New York Times Co. v. Sullivan* (1964) *supra,* 376 U.S. 254, at pp. 285-286, 84 S.Ct. 710.) Whether or not there was such malice is a question of fact to be determined by the trier of fact. (*Widener v. Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d 415, 142 Cal.Rptr. 304.) However, the reviewing court is required to review the evidence in a libel action by a public figure, to be sure that the principles were constitutionally applied. (*Montandon v. Triangle Publications, Inc.* (1975) 45 Cal.App.3d 938, 948, 120 Cal.Rptr. 186.) The court has the duty to examine the record to determine whether it could constitutionally support a judgment in favor of plaintiff, but this does not involve a de novo review of the proceedings below wherein the jury's verdict is entitled to no weight. (*Widener v. Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d at p. 433, 142 Cal.Rptr. 304.)

There is clear and convincing evidence to support the jury's finding that defendant Mitchell entertained actual malice and that defendant Doubleday had actual malice when it permitted the paperback printing of "Touching," although there was no actual malice on the part of Doubleday in its original printing of the hardback edition.

Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals

of that encounter.[2] Since she attended sessions there can be no suggestion that she did not know the true facts. Since "actual malice" concentrates solely on defendants' attitude toward the truth or falsity of the material published (*Carson v. Allied News Co.* (7 Cir. 1976) 529 F.2d 206; *Widener v. Pacific Gas & Electric Co.* (1977), *supra,* 75 Cal.App.3d 415, 142 Cal.Rptr. 304, and not on malicious motives,[3] certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.

However, plaintiff failed to prove by clear and convincing evidence that the original hardback publication by Doubleday was made with knowledge of falsity or in reckless disregard of falsity. McCormick of Doubleday cautioned plaintiff that the characters must be totally fictitious and Mitchell assured McCormick that the characters in "Touching" were incapable of being identified as real persons. McCormick arranged to have the manuscript read by an editor knowledgeable in the field of libel. The cases are clear that reckless conduct is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publica-

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[2]The fact that "Touching" was a novel does not necessarily insulate Mitchell from liability for libel, if all the elements of libel are otherwise present.

[3]There is no suggestion that Mitchell was being malicious in the fabrication; her intent may have been to be colorful or dramatic.

tion, (*St. Amant v. Thompson* (1968) *supra,* 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262), and there is nothing to suggest that Doubleday entertained such doubts prior to the hardback publication.

Plaintiff suggests that, since the book did not involve "hot news," Doubleday had a duty to investigate the content for truth. Courts have required investigation as to truth or falsity of statements which were not hot news (*Widener v. Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d 415, 142 Cal.Rptr. 304; *Carson v. Allied News Co.* (1976), *supra,* 529 F.2d 206), but those cases involved factual stories about actual people. In the case at bar, Doubleday had been assured by Mitchell that no actual, identifiable person was involved and that all the characters were fictitious in the novel. Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate. (See *Baldine v. Sharon Herald Co.* (3 Cir. 1968) 391 F.2d 703, 707.) There was nothing in the record to suggest that, prior to the hardback printing defendant Doubleday in fact entertained serious doubts as to the truth or falsity of the publication, and investigatory failure alone are insufficient to find actual malice.

However, prior to the paperback printing there were surrounding circumstances to suggest inaccuracy, such that at that point Doubleday had a duty to investigate. Plaintiff did show that Doubleday sold the rights to the New American Library after receiving a letter from plaintiff's attorney explaining that plaintiff was Herford and the inscription in the paperback said, "This is an authorized edition published by Doubleday

and Company." Although, after the receipt of the plaintiff's attorney's letter, Doubleday again inquired of Mitchell as to whether plaintiff was the character in the book, the jury was entitled to find that Mitchell's assurance to Doubleday was not sufficient to insulate Doubleday from liability and that Doubleday had some further duty to investigate. The jury could have inferred that at that point Doubleday either had serious doubts, or should have had serious doubts, as to the possibility that plaintiff was defamed by "Touching" and that at that point Doubleday had some duty to investigate.[4]

II

For similar reasons, the award for punitive damages against Doubleday may stand. A public figure in a defamation case may be awarded punitive damages when there is "actual malice" under the *New York Times* standard (*Maheu v. Hughes Tool Co.* (9 Cir. 1977) 569 F.2d 459), and, as we have said above, actual malice was established for Doubleday. The trial court below erroneously struck the award of punitive damages agianst Doubleday, on the ground that the jury did not award even token punitive damages against Mitchell although she had $165,000 in community property. The judge reasoned that the jury apparently found no fault or "malice attributable to her." However, the jury must have found that Mrs. Mitchell had "actual malice" to have awarded even compensatory damages against her. And the standard for punitive damages

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[4]Note: This paperback edition was published by New American Library, not by Doubleday, but was apparently published with Doubleday's permission. The parties do not raise the issue of whether Doubleday's "permission," i. e., whether Doubleday's "causing" the book to be published by another company, is actually a "publication" for purposes of libel, by Doubleday.

for libel of a public figure is "actual malice" under the *New York Times* case, not hatred. Since all that is required for punitive damages of a public figure is actual malice and not hatred (see *Maheu v. Hughes Tool Co., supra*), and since both Doubleday and Mitchell had "actual malice," it follows that punitive damages *could* have been awarded against both defendants. But since punitive damages are discretionary and wealth may be taken into account (see *Sandoval v. Southern Cal. Enterprises, Inc.* (1950) 98 Cal.App.2d 240, 250, 219 P.2d 928), it was proper to award punitive damages only against one defendant, and not the other.

III

Appellants claim that, even if there are untrue statements, there is no showing that plaintiff was identified as the character, Simon Herford, in the novel "Touching."

Appellants allege that plaintiff failed to show he was identifiable as Simon Herford, relying on the fact that the character in "Touching" was described in the book as a "fat Santa Claus type with long white hair, sideburns, a cherubic rosy face and rosy forearms" and that Bindrim was clean shaven and had short hair. Defendants rely in part on *Wheeler v. Dell Publishing Co.* (7 Cir. 1962) 300 F.2d 372, which involved an alleged libel caused by a fictional account of an actual murder trial. The *Wheeler* court said (at p. 376):

> "In our opinion, any reasonable person who read the book and was in a position to identify Hazel Wheeler with Janice Quill would more likely conclude that the author created the latter in

> an ugly way so that none would identify her with Hazel Wheeler. It is important to note that while the trial and locale might suggest Hazel Wheeler to those who knew the Chenoweth family, suggestion is not identification. In *Levey* [*Levey v. Warner Bros. Pictures* (S.D.N.Y. 1944) 57 F.Supp. 40] the court said those who had seen her act may have been reminded of her by songs and scenes, but would not reasonably identify her."

However, in *Wheeler* the court found that no one who knew the real widow could possibly identify her with the character in the novel. In the case at bar, the only differences between plaintiff and the Herford character in "Touching" were physical appearance and that Herford was a psychiatrist rather than psychologist. Otherwise, the character Simon Herford was very similar to the actual plaintiff. We cannot say, as did the court in *Wheeler,* that no one who knew plaintiff Bindrim could reasonably identify him with the fictional character. Plaintiff was identified as Herford by several witnesses and plaintiff's own tape recordings of the marathon sessions show that the novel was based substantially on plaintiff's conduct in the nude marathon.

Defendant also relies on *Middlebrooks v. Curtis Publishing Co.* (4 Cir. 1969) 413 F.2d 141, where the marked dissimilarities between the fictional character and the plaintiff supported the court's finding against the reasonableness of identification. In *Middlebrooks*, there was a difference in age, an absence from the locale at the time of the episode, and a difference in employment of the fictional character and plaintiff; nor did the story parallel the plaintiff's life in any significant manner. In the case at bar, apart from

some of those episodes allegedly constituting the libelous matter itself, and apart from the physical difference and the fact that plaintiff had a Ph.D., and not an M.D., the similarities between Herford and Bindrim are clear, and the transcripts of the actual encounter weekend show a close parallel between the narrative of plaintiff's novel and the actual real life events. Here, there were many similarities between the character, Herford, and the plaintiff Bindrim and those few differences do not bring the case under the rule of *Middlebrooks*. (See *Fetler v. Houghton Mifflin Co.* (2 Cir. 1966) 364 F.2d 650.) There is overwhelming evidence that plaintiff and "Herford" were one.

IV

However, even though there was clear and convincing evidence to support the finding of "actual malice," and even though there was support for finding that plaintiff is identified as the character in Mitchell's novel, there still can be no recovery by plaintiff if the statements in "Touching" were not libelous. There can be no libel predicated on an opinion. The publication must contain a false statement of fact. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 131 Cal.Rptr. 641, 552 P.2d 425.)

Plaintiff alleges that the book as a whole was libelous and that the book contained several false statements of fact. Plaintiff relies in part on the above quoted conversation between plaintiff and the minister as one libelous statement of fact. Plaintiff also argues that a particular incident in the book is libelous. That incident depicts an encounter group patient as so distressed upon leaving from the weekend therapy that she is killed when her car crashes. Plaintiff also com-

plains of an incident in the book where he is depicted as "pressing," "clutching," and "ripping" a patient's cheeks and "stabbing against a pubic bone." Plaintiff complains, too, of being depicted as having said to a female patient, "Drop it, bitch." There are also other incidents alleged to be libelous.[5]

Our inquiry then, is directed to whether or not any of these incidents can be considered false statements of fact. It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: i.e., substantially inaccurate description of what actually happened. It is also clear that some of these portrayals cast plaintiff in a disparaging light since they portray his language and conduct as crude, aggressive, and unprofessional.

Defendants here rely on the cases which have considered the difference in published materials between factual statements and matters of mere opinion. While, as we discuss below, we do not feel that those cases necessarily express the rules applicable where, as here, the published material purports to state actual facts concerning the characters in a novel, we proceed, first, to examine the cases on which defendants rely.

Many cases discuss the difference between fact and opinion. The court in *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6, examined the use of the term "blackmail" in a controversy between the parties over zoning, and found that,

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[5]We find it unnecessary to discuss each alleged libel separately, since if any of the alleged libels fulfill all the requirements of libel, that is sufficient to support the judgment.

although the use of that term in some circumstances could constitute libel, in the *Bresler* case the term was being used figuratively and did not connote actual commission of a crime.

In *Letter Carriers v. Austin* (1974) 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745, Jack London called someone a "scab," and defined the term with the phrase as a "traitor to his God, his country, his family and his class." (*Id.*, at p. 268, 94 S.Ct. at p. 2773.) Again, the *Austin* court held that the statements were used loosely and figuratively, and there was no libel in the use of the term "traitor." Thus, words that appear factual at first glance, such as "blackmail," and "traitor" may not be factual, depending on the context in which they were used, and whether they were used figuratively.

The courts have set guidelines in determining what is fact and what is opinion. One guideline is that an alleged defamatory statement may constitute a fact in one context and an opinion in another and content of the communication is taken as a whole. In certain settings fiery rhetoric and hyperbolic statements of fact may well assume the character of opinion. (*Gregory v. McDonnell Douglas Corp.* (1976) *supra*, 17 Cal.3d 596, 131 Cal.Rptr. 641, 552 P.2d 425.) Where the statements are unambiguously fact or opinion, *Gregory* applies, and the court determines as a matter of law whether the statements are fact or opinion. However, where the alleged defamatory remarks could be determined either as fact or opinion, and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury. (*Good Government Group of Seal Beach,*

Inc. v. Superior Court (1978) 22 Cal.3d 672, 150 Cal.Rptr. 258, 586 P.2d 572.)[6]

If viewed as a case involving an issue of "opinion," those cases, and other cases involving that issue, make it clear that, since there was evidence that people had identified plaintiff with the Dr. Herford of the book, the jury's finding against defendants is conclusive on that issue.

However, as we have indicated above, we regard the case at bench as involving a different issue. Defendants contend that the fact that the book was labeled as being a "novel" bars any claim that the writer or publisher could be found to have implied that the characters in the book were factual representations not of the fictional characters but of an actual non-fictional person. That contention, thus broadly stated, is unsupported by the cases. The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described. (*Middlebrooks v. Curtis Publishing Co.* (1969) *supra*, 413 F.2d 141, 143.) Each case must stand on its own facts. In some cases, suc' as *Greenbelt Pub. Assn. v. Bresler* (1970), *supra*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6, an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted. Similarly, in *Hicks v.*

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[6]Here, unlike the *Good Government* case, there is no actual "ambiguous" language in the novel. However, whether the literary incidents were understood by those readers who identified plaintiff with Herford as strictly fictional or as based on fact is similar to the question before the court in "*Good Government*" and the reasoning of that case applies.

Casablanca Records (D.C.S.D.N.Y. 1978) 464 F.Supp. 426, a trier of fact was able to find that, considering the work as a whole, no reasonable reader would regard an episode, in a book purporting to be a biography of an actual person, to have been anything more than the author's imaginative explanation of an episode in that person's life about which no actual facts were known. We cannot make any similar determination here. Whether a reader, identifying plaintiff with the "Dr. Herford" of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for the jury. Its verdict adverse to the defendants cannot be overturned by this court.

V

Defendants raise the question of whether there is "publication" for libel where the communication is to only one person or a small group of persons rather than to the public at large. Publication for purposes of defamation is sufficient when the publication is to only one person other than the person defamed. (*Brauer v. Globe Newspaper Co.* (1966), 351 Mass. 53, 217 N.E.2d 736, 739.) Therefore, irrelevant whether all readers realized plaintiff and Herford were identical.

VI

Appellant Doubleday alleges several charges to the jury were erroneous, and that the court improperly refused to give certain proffered instructions by them. Doubleday objects that the court erred when it rejected its instruction that Bindrim must prove by clear and convincing evidence that defendants intentionally identified Bindrim. Firstly, the "clear and convincing evi-

dence" standard applies to the proving that the act was done with "actual malice" and an instruction to that effect was given by the court. Secondly, defendants' instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim, was properly refused. For the tort of defamation, publication to one other person is sufficient, *supra.*

Defendant objects that the court refused the following instruction:

"DEFENDANTS' REQUESTED INSTRUCTION NO. 8

"The following statements in 'Touching,' and no others, may be considered by you to be possibly libelous:

1. The statement at page ....., lines .....
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"If you find that none of these statements libeled plaintiff, you must find for defendants."

Defendants argue that by the refusal of the above instruction the court failed to instruct the jury that it could only assess liability if it determined that the challenged statements were libelous. The court did instruct adequately in that area. The court instructed:

"DEFENDANTS' INSTRUCTION NO. 9

"In order to recover for libel, plaintiff must prove that a statement in the novel 'Touching' is reasonably susceptible of a libelous interpretation. In making this

determination you should consider the novel as a whole and the context of said statement.

"In determining whether a statement is capable of a libelous meaning, you should construe the words according to the fair and natural meaning that will be given them by reasonable persons of ordinary intelligence."

Defendant Doubleday claims confusion in the instruction on standard of proof. The instruction on clerk's transcript page 111 explained to the jury the additional burden of proof required for "actual malice."

Defendant alleges that the court failed to instruct the jury that the author and publisher should be considered separately for purposes of liability. However, the court did instruct the jury to consider each defendant separately and to decide each defendant's case separately.

Appellant Mitchell objects that the trial court erroneously allowed one of Bindrim's identification witnesses, Otto, to testify that a psychologist in 1971 or 1972 who was familiar with nudity and psychotherapy literature would be able to recognize Herford as Bindrim, and that someone who did not know Bindrim personally but was familiar with the literature would recognize Bindrim, citing only California Evidence Code section 800. First of all, defendant's objection to the lower court did not clearly state his ground of objection. Secondly, there was other evidence of identification by Hoover and by Hiller. And Otto also testified that he himself identified Bindrim as Herford because Bindrim had written about "peak experiences" and because of the character's style of talking to people. Therefore, defendant could not have been harmed by the above testimony.

Mitchell also objects that the court erroneously prohibited evidence that plaintiff once had sexual intercourse with a participant. This was irrelevant as to whether plaintiff was libeled by other inaccurate portrayals of his language and his conduct.

Appellant Mitchell alleged that she and Doubleday were joint tortfeasors and any judgment against them had to be joint and several. Contributing wrongdoers, whether joint, concurrent or successive tortfeasors are ordinarily jointly and severally liable for the entire damage. (*Gray v. Sutherland* (1954) 124 Cal.App.2d 280, 268 P.2d 754.) When they are joined in an action it is improper to apportion compensating damage among them; judgment for the full amount should be rendered against each. (*Oldham v. Aetna Ins. Co.* (1936) 17 Cal.App.2d 144, 61 P.2d 503.) Courts have resolved inconsistencies by the determination of the jury's intention from an examination of the verdict. (*Snodgrass v. Hand* (1934) 220 Cal. 446, 31 P.2d 198.) The appellate court will, if possible, make its own correction to uphold the verdict. (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 457, 72 Cal.Rptr. 217, 445 P.2d 881.) In the case at bar, the jury's intent was clear from their verdict, and this court will award plaintiff $50,000 as a joint and several award against both defendants, rather than the $25,000 against each of the two defendants as was awarded by the court. The defendant Doubleday is also liable in $25,000 punitive damages.

The Cross Appeal

Bindrim contends that the trial court erred in striking the damage award on the contract count. We are aware of no authority that a professional person can,

by contract or otherwise, prevent one of his patients from reporting the treatment that patient received. Since the whole theory of plaintiff's therapy was that of group encounter, what Mitchell saw done to and by other members of the group was part of her own treatment. She was free to report what went on. The limits to her right to report were those involved in the libel counts. Plaintiff has no separate cause of action for the mere reporting.

In addition, although plaintiff testified in broad language that he had been damaged by the publication of the book, it is not clear how much, if any, of that damage flowed from the inaccuracies in the book as distinguished from the fact that his encounter therapy had been given publicity. On this record, we cannot say that the trial court erred.

Finally, cross-appellant Bindrim argues that the reduction on the compensatory damage amount against Mitchell on the libel count should be restored. The judge reduced the verdict against Mitchell from $38,000 to $25,000 on the ground that there was no evidence that the publication of the libel to Mrs. Hoover caused any damage. We agree with the court's determination that Mrs. Hoover was fully aware of what actually happened at the session, and therefore that plaintiff could not have been damaged by any publication to her.

Cross-respondents argue that the compensatory damages should be reduced to a total of $25,000 against both defendants. Judge Wells entered a judgment in the sum of $50,000, by charging each defendant $25,000. The jury's verdict should be reconciled when possible. (*Maheu v. Hughes Tool Co.* (1977), *supra,* 569 F.2d 459.) Insofar as the defendants are jointly

and severally liable as joint or successive tortfeasors, we enter a $50,000 compensatory damage verdict against both defendants, for which they are jointly or severally liable.

Plaintiff's cross-appeal on the issue of punitive damages is well taken and the $25,000 award of punitive damages by the jury againt Doubleday should stand. The jury had discretion not to award punitive damages against one of the defendants, since as we have said before, the greater wealth of one defendant is relevant.

The judgment, as modified on the motion for a new trial, is further modified as follows:

(1) By substituting for separate judgments against defendants Mitchell and Doubleday a joint and several judgment against both of said defendants in the amount of $50,000; and

(2) By including in said judgment a separate judgment against Doubleday of $25,000 for punitive damages.

Otherwise the judgment is affirmed. Neither party shall recover costs on appeal.

JEFFERSON, Associate Justice, concurring.

Although I agree with the majority opinion authored by Justice Kingsley, I am writing a separate concurring opinion in order to comment upon the dissenting opinion. The dissent erroneously describes the majority holding as creating a cause of action for libel out of a work of fiction that attacks the techniques of "nude encounter therapy." Because of this misconception with respect to the majority's holding, the dissent reaches the conclusion that the majority's view "poses a grave threat to any future work of fiction

which explores the effect of techniques claimed to have curative value."

Had the defendant author of the work of fiction limited her novel to a truthful or fictional description of the techniques employed in nude encounter therapy, I would agree with the dissent that plaintiff had no cause of action for defamation. But here we have a description of a therapist as using insulting and vulgar language of the rankest sort in addressing his patients. Apparently the dissent does not consider that such language is capable of being considered defamatory of plaintiff in his professional role of a therapist practicing nude encounter therapy. The vulgarity purportedly used by the therapist in the novel would necessarily be considered by numerous persons as completely unprofessional and defamatory if used by a professional therapist such as the plaintiff. I fail to see how any jury or any court, could consider such crude vulgarity as *not* defaming a professional therapist to whom such vulgarity was attributed in the practice of his profession. I need not repeat this language here as it is set forth in the majority opinion.

" 'The code definition of libel is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or *with respect to his occupation.*' " (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546, 343 P.2d 36, 41.) (Emphasis added.)

The dissent concludes that the "average reader" would not have considered plaintiff defamed as a professional therapist who used the crude and vulgar language. But the dissent does not tell us what constitutes an "average reader." I assume that novels are read by

the learned, the not so learned, and persons in all walks of life. It is my view that any reader of the novel, whether familiar with a professional therapist's practices or not, might well conclude that a therapist described in the novel was a lewd and dissolute character in the practice of his profession. As indicated in *MacLeod,* a "publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." (*MacLeod, supra,* 52 Cal.2d 536, 547, 343 P.2d 36, 41-42.)

The case at bench is not like that of *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6 in which the court emphasized that "[*n*]*o reader*" could have thought that a newspaper which reported words of speakers were charging a developer with the commission of a crime in using the phrase "blackmail," and that, on the contrary, "*even the most careless reader* must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet . . . ." (*Id.* at p. 14, 90 S.Ct. at p. 1542.) (Emphasis added.) The *Greenbelt* court seems to place all readers—careful and careless alike—as average readers.

The dissent finds error in the instruction given the jury on the issue of identification. The use of the word "reasonably" in the instruction dissipates the dissent's view that only one person was required to understand the defamatory meaning. If one person "reasonably" understood the defamatory character of the language used, it describes what readers generally would "reasonably" understand. I see no basis for the dissent's view that the instruction had the result of mulcting

defendants for the exercise of their first amendment right to comment on the nude marathon. The first amendment right to comment does *not* include the right to commit libel.

The dissent sees in the majority opinion a branding of a novel as libelous because it is critical of an occupational practice. This is a distortion of the majority's position. The position of the majority is simply to refuse to permit a writer and publisher to libel a person and hide under the banner of having written only fictional material. "Of course the fictional setting does not insure immunity when a reasonable man would understand that the fictional character was a portrayal of the plaintiff. 'Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction or in jest.'" (*Middlebrooks v. Curtis Publishing Company* (4 Cir. 1969) 413 F.2d 141, 143.)

FILES, Presiding Justice (dissenting).

This novel, which is presented to its readers as a work of fiction, contains a portrayal of nude encounter therapy, and its tragic effect upon an apparently happy and well-adjusted woman who subjected herself to it. Plaintiff is a practitioner of this kind of therapy. His grievance, as described in his testimony and in his briefs on appeal, is provoked by that institutional criticism.[7] Plaintiff's "concession" that he is a public

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[7]The record demonstrates the essential truth of the author's thesis. A tape recording of an actual encounter session conducted by plaintiff contains this admonition to the departing patients:

> ". . . Now, to top that off, you're turned on, that is you're about as turned on as if you've had 50 or 75 gammas of LSD. That's the estimate of the degree of the turnon is. And it doesn't feel that way, because

figure appears to be a tactic to enhance his argument that any unflattering portrayal of this kind of therapy defames him.

The decision of the majority upholding a substantial award of damages against the author and publisher poses a grave threat to any future work of fiction which explores the effect of techniques claimed to have curative value.

The majority opinion rests upon a number of misconceptions of the record and the law of libel. I mention a few of them.

Defamation.

Libel is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided or which has a tendency to injure him in his reputation. (Civ.Code, § 45). A libel which is defamatory without the necessity of explanatory matter is said to be a libel on its face. Language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a result thereof. (Civ.Code, § 45a.)

Whether or not matter is on its face reasonably susceptible of a libelous meaning is a question of law. (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546, 343 P.2d 36.)

The complaint in this action quotes verbatim the portions of the defendant's novel which are alleged to be libelous. No explanatory matter or special damages

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you're [*sic*] been getting higher a little bit at a time. So don't wait to find out, take my word for it, and drive like you've had three or four martinis. Drive cautiously."

are alleged. The only arguably defamatory matter I can find in that complaint is in the passages which portray the fictional therapist using coarse, vulgar and insulting language in addressing his patients. Some of the therapeutic techniques described in the quoted passages may seem bizarre, but a court cannot assume that such conduct is so inappropriate that a reputable therapist would be defamed if that technique were imputed to him. The alleged defamation therefore is limited to the imputation of vulgar speech and insulting manners.

The defendants asked the trial court to give an instruction to the jury identifying the matter which it could consider as defamatory. The trial court refused. Instead, the court sent the case to the jury without distinction between actionable defamation and constitutionally protected criticism. In addition, the trial court's instructions authorized the jury to award special damages for loss of income which could have resulted from the lawful expression of opinion.

Identification.

Whether or not an allegedly defamatory communication was made "of and concerning the plaintiff" is an issue involving constitutional rights. (*New York Times v. Sullivan* (1964) 376 U.S. 254, 288, 84 S.Ct. 710, 11 L.Ed.2d 686; see Rest. Torts, 2d, § 580A Com. (g).) Criticism of an institution, profession or technique is protected by the First Amendment; and such criticism may not be suppressed merely because it may reflect adversely upon someone who cherishes the institution or is a part of it.

Defendants' novel describes a fictitious therapist who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession.

Indeed the fictitious Dr. Herford has none of the characteristics of plaintiff except that Dr. Herford practices nude encounter therapy. Only three witnesses, other than plaintiff himself, testified that they "recognized" plaintiff as the fictitious Dr. Herford. All three of those witnesses had participated in or observed one of plaintiff's nude marathons. The only characteristic mentioned by any of the three witnesses as identifying plaintiff was the therapy practiced.

Plaintiff was cross-examined in detail about what he saw that identified him in the novel. Every answer he gave on this subject referred to how the fictitious Dr. Herford dealt with his patients. (See Appendix C to Opening Brief of Mitchell.)

Plaintiff has no monopoly upon the encounter therapy which he calls "nude marathon." Witnesses testified without contradiction that other professionals use something of this kind. There does not appear to be any reason why anyone could not conduct a "marathon" using the style if not the full substance of plaintiff's practices.

Plaintiff's brief discusses the therapeutic practices of the fictitious Dr. Herford in two categories: Those practices which are similar to plaintiff's technique are classified as identifying. Those which are unlike plaintiff's are called libelous because they are false. Plaintiff has thus resurrected the spurious logic which Professor Kalven found in the position of the plaintiff in *New York Times v. Sullivan, supra,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. Kalven wrote: "There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the

plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place. . . ." Kalven, *The New York Times Case: Note on "The Central Meaning of the First Amendment,"* 1964 The Supreme Court Review 191, 199.

Even if we accept the plaintiff's thesis that criticism of nude encounter therapy may be interpreted as libel of one practitioner, the evidence does not support a finding in favor of plaintiff.

Whether or not a publication to the general public is defamatory is "whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory." (*Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 765, 70 Cal.Rptr. 44, 46. See *Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal. 3d 672, 682, 150 Cal.Rptr. 258, 586 P.2d 590; Rest. Torts, 2d, § 559, comment (e).)

The majority opinion contains this juxtaposition of ideas: "Secondly, defendants' [proposed] instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim (CT 173, 171), was properly refused. For the tort of defamation, publication to one other person is sufficient, *supra.*"

The first sentence refers to the question whether the publication was defamatory of plaintiff. The second refers to whether the defamatory matter was published. The former is an issue in this case. The latter is not. Of course, a publication to one person may constitute actionable libel. But this has no bearing on the principle that the allegedly libelous effect of a publi-

cation to the public generally is to be tested by the impression made on the average reader.

The jury instruction on identification.

The only instruction given the jury on the issue of identification stated that plaintiff had the burden of proving "That a third person read the statement and reasonably understood the defamatory meaning and that the statement applied to plaintiff."

That instruction was erroneous and prejudicial in that it only required proof that one "third person" understood the defamatory meaning.

The word "applied" was most unfortunate in the context of this instruction. The novel was about nude encounter therapy. Plaintiff practiced nude encounter therapy. Of course the novel "applied to plaintiff," particularly insofar as it exposed what may result from such therapy. This instruction invited the jury to find that plaintiff was libeled by criticism of the kind of therapy he practiced." The effect is to mulct the defendants for the exercise of their first amendment right to comment on the nude marathon.

Malice.

The majority opinion adopts the position that actual malice may be inferred from the fact that the book was "false." That inference is permissible against a defendant who has purported to state the truth. But when the publication purports to be fiction, it is absurd to infer malice because the fiction is false.

As the majority agrees, a public figure may not recover damages for libel unless "actual malice" is shown. Sufficiency of the evidence on this issue is another constitutional issue (*St. Amant v. Thompson*

(1968) 390 U.S. 727, 730, 88 S.Ct. 1323, 20 L.Ed.2d 262.) Actual malice is a state of mind, even though it often can be proven only by circumstantial evidence. The only apparent purpose of the defendants was to write and publish a novel. There is not the slightest evidence of any intent on the part of either to harm plaintiff. No purpose for wanting to harm him has been suggested.

The majority opinion seems to say malice is proved by Doubleday's continuing to publish the novel after receiving a letter from an attorney (not plaintiff's present attorney) which demanded that Doubleday discontinue publication "for the reasons stated in" a letter addressed to Gwen Davis. An examination of the latter demonstrates the fallacy of that inference.

The letter to Davis [Mitchell] asserted that the book violated a confidential relationship, invaded plaintiff's privacy, libelled him and violated a "common law copyright" by "using the unpublished words" of plaintiff. It added "From your said [television] appearances, as well as from the book, it is unmistakable that the 'Simon Hereford' mentioned in your book refers to my client."

The letters did not assert that any statement of purported fact in the book was false. The only allegation of falsity was this:

> "In these [television] appearances you stated, directly or indirectly, that nude encounter workshops, similar to the one you attended, are harmful. The truth is that those attending my client's workshops derive substantial benefit from their attendance at such workshops."

These letters gave Doubleday no factual information which would indicate that the book libelled plaintiff.

The letters did not put Doubleday on notice of anything except that plaintiff was distressed by the expression of an opinion unfavorable to nude encounter therapy—an expression protected by the First Amendment. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339, 94 S.Ct. 2297, 41 L.Ed.2d 789; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600, 131 Cal.Rptr. 641, 552 P.2d 425.)

From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is "false," i.e., fiction; and infers "actual malice" from the fact that the author and publisher knew it was not a true representation of plaintiff. From a constitutional standpoint the vice is the chilling effect upon the publisher of any novel critical of any occupational practice, inviting litigation on the theory "when you criticize my occupation, you libel me."

I would reverse the judgment.

Rehearing denied; FILES, P. J., dissenting.

APPENDIX B.

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Excerpt from "Touching"	*Transcript of Actual Session*
I entered the guesthouse where the talk part was to be conducted, and I tried to sit with her same cross-legged ease in the pillow-boundaried circle on the rug while Dr. Simon Herford passed the egg timer. Name, first only. How many naked marathons had you been to, how you happened to come to this one, as much of your story as you cared to tell in the three minutes before the grains ran out.	"Allright, then let's begin by getting acquainted, and we'll do that in the usual way, which is pretty much in our head, and gradually we'll get out of our head as we move along through the session. There are different things that we'd like to know about each other in general, why you happen to be here. How you happened to find out about it, what you want to get out of it—both of those are interesting to me. Sometimes the kind of work you're in interests me. "We'll each have three minutes, and if you don't fill up the three minutes the group will ask whatever they would like to know about you, and the person on the right will hold an egg timer, and when the three minutes is up they will stop you; and if you're holding the egg timer stop the person directly at the three-minute mark."
13-14 There was a minister from Pasadena who had been coming to these sessions for months and was conducting sensitivity training sessions at his church; beside him was a woman member of his congregation who hadn't known he would be there and was already giggling with embarrassment, as Simon bellowed that *there* was a fantasy and a half, to see your own minister naked. Everyone laughed at that.	"What do you do, Roger?" "Preacher, minister, pretty good at my work. Ran into sort of a parishioner here." (one person laughs, then everybody.)
14 But I couldn't have summoned up a smile about the girl, the big-breasted girl named Trudy who kept interrupting with the angry fact that she hated penises,	"I want to talk about something, Paul. I've had some trouble off and on . . . I can't stand for a man's penis to touch me." (yech)

Excerpt from "Touching"	*Transcript of Actual Session*
14 ("Our Blessed Virgin Mother never had relations with a man,	"The blessed Mother was a virgin all her life."
14 "You mean you're afraid of getting a *rod* on?" he shouted at the dark, terribly hairy young shipping clerk. "You're afraid if you get into the pool naked with a lot of pretty women you're going to get a rod on? Well, wouldn't that be a shame, wouldn't that be a reason to hang your fucking head, that you see a lot of pretty women naked and you get a rod on. Did your mama tell you that was a disgusting thing to do?"	"I'm a shipping clerk." "now, I don't feel any particularly, but in time I might get sexually aroused." "You're going to get a hard on." "Mm, well, I don't know what would happen. I never been exactly in this type of situation before." "Let's just imagine, here we all are nice and nude and calm, cool and collected and you're walking around with a big rod on. "Here you are, we're all controlling ourselves, and we're nice, calm, cool and collected, you've got a great big rod on, and who're the people who think they're vulgar, who here is going to think you're vulgar?"
15 The shipping clerk's head went further into his chest, his hairy fingers pulled at the mat of the carpet, and his eyes fluttered like dark heavily petaled flowers caught in an ungentle wind. "I didn't . . . I wouldn't want to.	"You divorce yourself from the human race by not looking into the people's eyes you're talking to. You wipe them out, you look down and talk at the rug like you're not there. See if you can look at each person you talk to, look into their eyes."
15 television executive,	"I'm self employed in the television business."
15 a man who ran a nudist colony,	"It happens that on this health resort that I own, there is a large nudist park, and I'm the head of it."

Excerpt from "Touching"	*Transcript of Actual Session*
15 self-proclaimed genius who annoyed me with his deep yoga breathing and his pronunciamento that he had discovered the seat of his staggering cerebral power with acid,	"and I discovered I am a fantastic genius but I covered up." What made you decide you were a fantastic genius?" "Uh, chemical experiences." Chemical experiences?" (Noise) "Well, it was mescalin and one acid and several, oh about 14, 15 or 20 other types with a psychiatrist."
15 A young girl to my left was weeping, openly, wailing her despondence, a despondence the origins of which were unknown to her, but had been released the last time she went in the pool with Simon.	"I came to Paul's marathon three weeks ago. That was my first experience with it, and I'm . . . (weeping) "Since then all kinds of childhood memories have been just coming out."
16 a young, bearded, handsome boy who had started a Growth Center in Oregon,	"I'm from Oregon. Right now I've been . . . up there too long. I've lived in L.A. about 12 years, before that I also needed books to figure . . . And also I did a growth center thing."
16 had come to observe Simon, tell that the uptightness of his marriage had been obliterated by nude marathons. Since the last marathon he and his wife had had as many as three peak experiences a night.	"Around that circle this was the most beautiful experience that I've ever had, except for the one with my wife. I feel like I'm going to cry but I want to tell you about it, because it really was tremendous. She came back from the marathon with Paul a new person. She had, she was just beautiful, and she had real self-esteem, she really thought of herself as a beautiful person. When I knew this, and when she told me what had happened to her it released me, because I had held back in our marriage, because I knew she couldn't really take what I had to give her, including my anger, and I had all kinds of things because it would have just knocked her flat, and she came back whoom, and my gosh the load

Excerpt from "Touching"

16

Another man was nervous about exposing himself, and Simon assured him there was nothing to fear. He was worried about size, he said, self-conscious about his size;

16

Soralee, said that maybe what that proved was that it wasn't only women that had penis envy, that men had it, too,

17

"My name is Soralee," I'm here because when I was fifteen years old, I was sitting under a tree, reading a book, smelling the grass, and all I wanted from life was to grow up, so I could have a handsome successful husband and beautiful children. Now I'm thirty-two years old, and I have the husband, and I have the beautiful children. And all I want from life is to be back under that tree."

Simon chortled, "Join the rest of us," With that, everyone started laughing.

45

we were actually undressing (in separate rooms, men in one, women in the other—Simon didn't want to lend the exercise the quality of a striptease, because that is sexual, ha!)

Transcript of Actual Session

just went right off of me, and I had three peak experiences in bed with her that night."

"But I have a little anxiety. It's a little small one so here it is. I'm not worried as most of the guys are, or several guys have expressed, of getting erection there, but I have noticed that my own penis changes size . . ."

"Were you saying that men have penis envy?"

"My name is Gwen . . ., and I spent most of my fat adolescence lying on a hill, under a tree, reading a book, wishing I had two beautiful children and a handsome husband, and now I have a handsome husband and two beautiful children, and I wish I were lying under a tree." (Laughter)

"Join us" (Bindrim) (Laughter)

"I'm worried about the logistics of how we are going to change into becoming naked." (Gwen)

"Allright, let's clarify that point. We've got a woman's room, woman's dessing room and a men's dressing room, and the idea is to keep those private, so that if anybody does want to wear a bathing suit they can, and it also eliminates the lingerie striptease. We've had nudity and sexuality and so on so tied

Excerpt from "Touching"

45
the man who ran the nudist colony paraded around the blue-tiled edge with his socks on, which I regarded as rather funny,

52
"You, what's your name again?"
"Why were you holding your legs so tight together?"
"Simon and I almost broke our arms trying to separate your legs."
"How funny." It really was funny, even though I couldn't laugh.

52
The girl who had wailed so despairingly at the outset of the marathon was sobbing again, talking about a childhood doll that she and a boy had cut open to find out what was inside, and an ectopic pregnancy, and the overwhelming feeling she experienced in the pool that she was that doll, and she was all mutilated inside,

Transcript of Actual Session

with a sexual complex that we can't experience it in its pure form without being triggered in other directions, and so for that reason initially we undress in separate rooms and meet in the pool."

"But you came into the pool with your socks on. That was the funniest thing I've ever seen, you walked the entire length of the pool."

"Passing you, I can tell who is tense—who is open, you know, and some women practically had their legs crossed. I don't remember exactly who it was . . ."
"What's your name?"
"Gwen." "Gwen, yeh."
"Your legs were rigid, just rigid!"
"We couldn't pull them apart if we wanted to."
"Were you aware of that?"
"Sometimes, sometimes not. I was having the best time. I was having the best time. I was on the verge of laughter the whole time."
"Your legs were rigid both times."
"I noticed."
"You wouldn't let anybody pull 'em apart."

"In thinking about a dream I had after the marathon I remembered the name of a boy that I used to play with when I was two or three years old, and I remembered what it was, and I asked my mother if she knew, and she said this boy had torn apart a doll that I really loved when I was little, and I cried for days as though someone really had been murdered. I don't real-

Excerpt from "Touching"

Transcript of Actual Session

ly remember doing that. (Weeping) I remember that we both wanted to know what was inside it, and I remember giving my permission that he should look inside . . . I suddenly became aware of how mutilated I felt inside all my life . . . I had an operation three years ago, a hideous operation, where I had a tubal pregnancy, and they removed the tube, but during the operation I woke up."

53

Nor did I want to hear any further boring apologies from old hairy shipping clerk Nick, with his leaden eyes, weighted to the floor, that Simon kept urging him to raise. Look at the girls, Nick,

"You divorce yourself from the human race by not looking into the people's eyes you're talking to. You wipe 'em out. You look down and talk at the rug like you're not there. See if you can look at each person you talk to, look into their eyes. Try it, try it when you talk to her, look into her eyes."

53

The man who ran the nudist colony had left us for a moment, returning with his undershirt on. I mentioned that he had kept his socks on around the pool, and now here he was, putting on his undershirt.

"Well, what does it matter," he said, "if the important part is hanging out?"

"You look very obscene with a T shirt on." (Laughter)
"Ironic that the owner of a nudist park . . . (Laughter)"
"But you came into the pool with your socks on." It's just you keep covering up these funny areas. (Laughter) Like your ankles and chest."
"I've left the most important one exposed."

57

It was close to midnight, and time for the second step. Animal contact, starting with the "eyeballing" we were to do. Eye to eye, staring into each other's spirits, sniffing each other out like animals, wordlessly, then making our first physical contact, mutely touching; finally, after the touching had been

"Well let's take the next half hour on something new let's do some animal introductions. Who'd like to demonstrate the way it's done, the way animals meet."

"Instead of talking if I had a cat you'd put another cat down on the floor they'd both eyeball first for a period of time. After

Excerpt from "Touching"

done, words. Words that expressed feeling achieved in that animal touch.

65

"You don't understand at all. Simon's saving me. When he found me I was in the hospital, and I had just tried killing myself for the third time. He's saving me, don't you see?"

66

Simon had made the circle tighter, by pushing the multicolored pillows even closer together, so that there was only a small free area in the center of the yellow carpet. We were all on our feet now, waiting. "Just keep milling around now, mill around to the music, keep moving and forget that the object is skin contact. But let yourself have it. Just mill and get skin contact, moving and letting what touches, touch. Hands at your sides. Anybody who moves around like this," Simon held his palms up in front of him in mock static feeling for breasts, "or like this," he groped the air at genital level, "gets their ass kicked in." The group laughed.

Transcript of Actual Session

that they get an urge to do something physically and they carry it out. This might be hugging, sniffing each other's butt, lying down again and chasing each other, anything can happen."

"In this you eyeball first. When you have an urge to do something physical you carry it out. Then later on, when all that's over with, you can express a few words if you want to talk."

"When I first came a year ago I had been out of the hospital about eight months, and I wasn't feeling that good, and I was feeling kind of desperate and wanted something entirely different, something new, something radical, something to move me. So my psychiatrist sent me to Paul."

"Why were you in the hospital?"

"Because I was suicidal."

"We'll do a little milling. Now we'll take this center area here, let's say from the doorway there to the wall here, and put our pillows across there—make a line of pillows there, and a line of pillows right about here, from that wall to here, and that will give us a pen in between the pillows. Now we'll play some music, and then you'll walk around in that pen gently, with your eyes closed, and not attempt to experience any physical contact, nor attempt to stay away from physical contact."

"If you pick out your favorite girl and stand in one corner squeezing against her, you ain't gonna feel nothing but what you've already felt many a time and better and I don't think you're paying me sixty-five

Excerpt from "Touching"

Simon turned on a strobe light: It began flashing, slowly at first,

And now the music was up full, pounding, the lights were flashing full speed, and Simon was screaming,

82

Henry, came scrambling in from the terrace outside, signaling frantically to Simon for a pencil.

Simon handed him the pencil, and Henry anxiously scrawled, "I have just been bitten by a rattlesnake."

("It's all right to go into the pool, I don't think it really broke the skin, but there's no point in taking chances, if you feel at all funny, tell me, and you better stay out of the highly physical stuff").

126-127

The minister was telling us how the experience had gotten him further back to God,

And all the time he was getting closer to God, he was being moved further away from his wife, who didn't understand, she

Transcript of Actual Session

bucks to experience what you can experience without me anyway. So, just keep moving gently and begin to feel a whole pulse. Also when you walk, you can walk in two ways. You can either hold your hands straight up in the air or right at your sides, but nobody mills this way." (Laughter)

"I usually leave enough light on in the room so if any guy moving this way I put an X on his ass, and when we turn on the lights we tell him off . . . Then after a period of time, you certainly will it, "You'll hear perhaps some very fast dance music, and at that point you can break up the milling, and you can go into a dancing experience. While we're milling, after we're milling for a time, I am going to start a strobe flashing very slowly."

"During the silent period, this guy walks up to me and asks me where's a pad to write . . . A couple minutes later he comes in . . . He hands me something to read, and I look at it and it says, 'I've just been bitten by a rattlesnake'."

"I mean, we checked, and there was no puncture marks, so the snake hadn't punctured, but we still kind of kept an eye on him."

"I've come a little way,"

"I'd like to know about your wife. She hasn't been to a marathon?"

"No."

"Isn't interested? Has no need?"

Excerpt from "Touching"

didn't understand at all. She didn't realize what was coming out of the sensitivity training sessions he was conducting in the church.
he felt, he, more than felt, he knew, that if she didn't begin coming to the nude marathons and try to grasp what it was all about, the marriage would be over.

"You better bring her to the next marathon," Simon said.

"I've been trying," said the minister. "I only pray she comes."

"You better do better than pray," said Simon. "You better grab her by the cunt and drag her here."

"I can only try."

"You can do more than try, Alex. You can grab her by the cunt.

"A man with that kind of power, whether it comes from God or from his own manly strength, strength he doesn't know he has, can drag his wife here by the fucking cunt.
"I know," Alex said softly. "I know."

Transcript of Actual Session

"I don't—she did finally say that she would like to go to a standard sensitivity training session somewhere. She would be —I can't imagine her in a nude marathon. She can't imagine it."

"Why?"

"Neither could I when I first came."

"Yeh. She might. I don't know."

"It certainly would be a good idea for two reasons: one, the minor one is that you are involved here, and if she were in the same thing, and you could come to some of the couple ones, it would be helpful to you. But more than that, almost a definite recipe for breaking up a marriage is for one person to go into growth groups and sense change and grow . . ."

"I know that."

"Boy they sure don't want that, and once they're clear they don't need that mate anymore, and they are not very patient."

"But it is true, the more I get open the more the walls are built between us. And it's becoming a fairly intelligent place, a fairly open place, doing moderate sensitivity eyeballing stuff with the kids. I use some of these techniques teaching out class work."

"Becoming more involved?"

"Yeh, involved at the same time that I am more separated from. It's a paradox again, isn't it?"

"Mmm."

128

The nod was given to the man from the nudist colony, who, asked what he felt in the pool, started to weep. "I was on a platform," he said, and his eyes

"I made a connection between a little boy who's mother left him and love walked away. She rode away on a train and waving at her. And then years later com-

Excerpt from "Touching"

were full, brimming over. "I was, oh, maybe four or five years old and I was waving good-by to my mother, my beautiful mother, and she was waving good-by to me from the back of that train,

"And then one day I was standing on that platform, waiting for a friend of mine who was coming in from Chicago, and there she was, on the back end of the train, waving to me, only it wasn't my mother, it was my new sweetheart, the sweetheart my friend was bringing in his sister, my beautiful new sweetheart, waving to me.

And she became my wife, my sweetheart became my wife.

129

"When you came up in the water, you beat at Simon, like a little boy, angry little fists pounding at the air, hitting on his chest like a four-year-old boy." Soralee smiled. "You're very angry with your father, you know. You're still very angry with him for driving your mother away. You must think it's his fault that your mother went away on that train and never came back.

131

"Let's have a hand count," Simon said. "I'd like to see the hands of every woman in this room who's had a penis in her mouth."

Transcript of Actual Session

ing from Illinois was my girl, my bride, the girl I was going to marry, and she was way down at the end of the platform and I saw her down there, and she was so beautiful, and she waved, and it was like love walking back into my life."

"And you were very mad at me, I felt, for in some way opening it up. While you wanted it open you got god damned mad that it was open . . ."

"I was watching my step because you could just as well have slugged me."

"Oliver, was it your father's fault your mother went away?"

"In part. It takes two to tango."

"You still mad at him?"

"That's going to have to come out in another session."

"Maybe you women will be honest about this, about answering one simple question. Have you had a penis in your mouth? Let see your hands, how many will be honest? Fine. Let's have an honest answer here. How many of you have had a penis in your mouth? Allright, so what the hell."

Excerpt from "Touching"

131

It was the turn of the acid freak, the self-proclaimed genius,

He had had his own flashes lying face down on the tile, and that was all he needed, he had

131-132

"When Simon tried to get all the men to embrace Edgar," Soralee said, "when he signaled everybody to come around and cuddle him, put their faces around his body to comfort him, Simon almost had to pull you over bodily, and when you saw why he wanted you, what he wanted you to do, you more than resisted him, you would have chopped him down like a tree before you let your face touch a man's body."

"So what?"

"You're a fag," said Soralee.

"Cunt!"

"Maybe. I calls 'em as I sees 'em."

Don't misunderstand me, I don't think there's anything wrong with being a fag, as long as you know it, and work it out,

"You know what you ought to be," said woodsy George to Soralee, beaming his surrogate approval. "You ought to be a psychologist."

132

That's why you keep doing the breathing, that's why you keep intruding your goddamn yoga tricks on what's going on here, that's why you drop acid and risk damaging your genius brain. You're afraid to let yourself get involved because of what you might find out about yourself."

Transcript of Actual Session

"And the only little relief I did get when I was really heating up was when I was all along, crying down there at the other end of the pool, lying on my face."

(GWEN) "Arthur, why did you fight so violently with Paul when he tried to make you put your head close to Oliver?"

"Well, I . . . uh . . . I . . . I thought I had gotten through all this fear of homosexuality, and yet I . . .

(GWEN) "What would be so terrible about the fear if you faced it squarely. What would be so terrible about your face if it were placed next to his?"

(GWEN) "Terrific with other people."

"Very good. Very good."

"You ought to be a psychologist."

GWEN

"The reason why I attacked your breathing was not because I minded your breathing, but it was just that I felt from the onset of this whole thing, you were bringing it other tricks, literally tricks, to get through it without being in it. You were bringing yogi tricks or mystic tricks and mind-blowing tricks, anything to avoid really being here."

Excerpt from "Touching"	*Transcript of Actual Session*
133 And Sonia was weeping, helplessly weeping. "Just when I was starting to realize how wonderful sex could be, it was taken away from me,	(Weeping) "It was my complete rejection on account of our divorce. Just as I learned how fine sex can be it was taken away from me."
134 "I don't know if it will make you feel any better, Sonia, but I for one, think you have a beautiful pussy." "Thank you," Sonia said, and her fingers passed shyly over the pale red pubic hair,	"Something else I wanted to tell you . . . that you have a nice pussy. I like the red hair . . ."
136 "I don't want to ruin it for Nick," Soralee said. "I suppose we should wait until it gets around to him."	"You went into another rage. I didn't think I should speak before him."
136 "You freaked out completely," you tried to kill people."	"I thought you were going to kill twice."
138 What if I left here filled with all the despair I saw around me, only inside *me* and I drove down this terrible road, this awful dangerous road with all its cliffs and fucking blind curves, what if I had let you get to me and I suddenly had the impulse to go off the road?"	"And then I thought about driving down the hill which I was afraid of driving up, and I thought if I go through it I might not make it down." (GWEN)
139 Why, I bet you were even afraid to sleep outside last night because you might get bitten by a rattlesnake." "The thought had occurred to me," Soralee said. They started laughing, riotously, laughing out loud,	"You know, you're the kind of woman who'd come to one of these sessions and be afraid she's going to be bitten by a rattlesnake." "That had occurred to me." (Laughter)
140 "You're full of shit," Simon said. "Nothing would have happened to you, you're just scared."	"I talked to you a couple of times. I talked to very few people here, but I did talk to you a couple times. ("I appreciated

Excerpt from "Touching"

"All right. I admitted I was scared. But my psychiatrist told me if it got to be too much for me, I should leave."

"Your *psychiatrist!*" Simon said, and the word was as full of scorn as Soralee's "psychologist" had been. "Your psychiatrist would have gone through the fucking roof if he let himself go through what we did in the pool."

"I have no doubt he would have," Soralee said calmly.

"You left because you're a coward."

"Well, maybe you ought to stop working things out in your head, and get to your gut, maybe you ought to stop being such a fucking cerebral sophisticate chained to an outdated, useless psychiatrist, and start working on your gut level, lady."

Transcript of Actual Session

it.") You looked so scared, and I wanted to help you so that you wouldn't build up all this within yourself that way."

"But what if I had left it all here in the pool, and I couldn't go home whole? That's the thing."

"That's the what ifs, see."

"It's an honest expression."

"What you're talking about now is trust. You don't trust me, you don't trust the group, you don't trust the fact that for three years this stuff has been going on. If people were going crazy all over the place and not getting home, you'd think it would still be going on? Do you think the friend would have recommended it?"

"Try, your main, see your main block is your intellect, beautiful as it is. This is your main block. If you can drop the reasons that are so rational you'll come to grips with what's there, and then you may decide to find it is right or it is not right and do something about it; and I frankly am not the least bit concerned about what your analyst had to say. I'd like to see him in the pool."

"He would scream louder than anybody. I have no doubt about it." (Laughter)

"He'd probably go right through the God damned door. Right through the glass door. I don't know."

141

What the fuck do you know about ovaries, do you even know where they are, what permanent, deadly damage you could do?"

"Of course," he said, as angry as she was. "I had two years of medical school."

"That's a lie,"

"Can I ask you one terrible pointed question?"

"I wish the hell you'd be frank for a change."

"Do you know about the location, the next exact location of the ovaries and the things that are done there?"

Excerpt from "Touching"

142

"You're going to have flashes of insight you didn't know you could have, you're as turned on as if you smoked a kilo of pot, or taken five hundred micrograms of LSD. Man, you're going to taste and touch and see and feel like you've never done before, you're going to see what peak sensitivity really means. And when you've understood, with that big clever brain of yours, when you've gotten to what gut level really means, maybe you'll start to spill them. Maybe you'll spill your guts and start to grow."

Transcript of Actual Session

"Sure, I've had two years in medical college dear."

"O.K. Well I feel better now." (Laughter)

"And no woman has ever that wouldn't have made a damn bit of difference anyway. No woman has ever been hurt, and the degree to which we put pressure is not enough so that it would hurt an ovary or any internal organ."

"Well, let's see, what else is there to tell you. Oh. Driving home."

"You have a hell of treacherous road. They tell me you can also take this road that goes up here, and you wind up in Topanga Canyon. But Topanga Canyon is a pretty rugged road too! Now, to top that off, you're turned on, that is you're about as turned on as if you've had 50 or 75 gammas of LSD. That's the estimate of the degree of the turn-on is. And it doesn't feel that way, because you've been getting higher a little bit at a time. So don't wait to find out, take my word for it, and drive like you've had three or four martinis. Drive cautiously."

"Why don't we just stay over 'til tomorrow." (Laughter)

"But really, do that. We've had a few near accidents because of the turn-on, and it's not serious enough so since I've been mentioning it everything has been going great. But otherwise we'd have people pick you up. But, you know it's like having a couple of cocktails and then driving home. You exercise a little more care after you've had a few drinks. So I would suggest that on your way home."

Excerpt from "Touching"	*Agreement signed by Mitchell (Plaintiff's Exhibit 33)*
12 but had signed an agreement with Simon not to use anyone's name or reveal anything that might occur during the marathon that anyone there objected to my telling.	13) The participant agrees that he will not take photographs write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants.
58 the sentence that disclaimed liability on the part of Simon Herford for anything resulting from something for which the participant had granted him permission.	15) The participant understands that this is an experimental workshop and that there may be some risks involved. In consideration of the undertaking by Paul Bindrim and his leaders of the services herein paid for by the registration fee, he hereby agrees to release them from any and all claims he might have or make against them arising out of or in any way connected with such services, including accidents occurring in connection with transportation to or from the workshop, or in the building or grounds where the workshop is conducted. He understands that there is no lifeguard on duty, and agrees to enter the pool at his own risk.
58 The paragraph of the contract that troubled me most deeply was the agreement to make restitution for any physical damage done during the course of the encounter.	9) The participant understands that physical confrontations are permitted between consenting parties to the extent of causing pain, but not causing injury, and he agrees to take responsibility for his own actions in this respect. He also agrees to be responsible for any property that he may damage.

Excerpt from "Touching"

57

I would like now to tell you about the contract we all had had to sign, even those of us who were not there for a magazine. Soralee and I had laughed over it very loud and long because there were actually clauses pledging we would not touch each other's breasts or genitalia; that we would sleep, during the sleeping phase, three feet apart; that anything acceptable in a social situation with clothes on, hugging, kissing, etc., was acceptable at the marathon, naked. But any aspect of physical contact with sexual implications such as petting, the fondling of private parts, and intercourse (sexual implications?) were forbidden.

57

There was another clause specifying that no last names, addresses or phone numbers were to be exchanged without the permission of Herford, and that those who wished to contact each other after the marathon should wait a week before doing so.

58

Along with the contract, he had given each participant, prior to the encounter itself, what Soralee and I had dubbed a peak sensitivity list. There were blank lines and numbers after each: "Three things I like to taste are, three things I like to feel, three things I like to smell, three things I like to listen to, etc., are."

Agreement signed by Mitchell (Plaintiff's Exhibit 33)

10) The participant agrees not to engage in overt sexual expression during the workshop. He understands that this is defined as any sexually oriented activity which would generally be considered socially unacceptable in a similar group wearing clothing. Thus, body contact, hugging and kissing are allowable, but intercourse, the fondling of breasts or genitalia are not permissable. He also agrees to sleep alone, whether single or married.

12) The participant understands that the leaders will not release the names and addresses of participants to other group members, and that if he wishes this information he should obtain it directly. He understands that in some instances it may be advisable to wait a week before continuing relationships established at the workshop, and he agrees to use his own discretion in this matter.

Material Distributed to Participants (Plaintiff's Exhibit 41)

PREPARATION FOR GROWTH EXPERIENCES USING PEAK STIMULI AND DREAMS

Peak stimuli are the things that you most enjoy smelling, tasting, touching, looking at and listening to, and doing. When you experience them they tend to lift your mood and make you feel a little better than you normally do. Naturally, your tastes differ from other people's, so it is necessary for you to make up your own list by filling in the following blanks:

1. The three things that I enjoy smelling the most are:
   1..... 2..... 3.....
2. The three things that I enjoy tasting the most are:
   1..... 2..... 3.....
3. The three things that I enjoy touching the most are:
   1..... 2..... 3.....
4. The three things that I enjoy looking at the most are:
   1..... 2..... 3.....
5. The three things that I enjoy hearing the most are:
   1..... 2..... 3.....
6. The three things that I enjoy doing the most are:
   1..... 2..... 3.....

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. ....., and
No. .....

79-556

GWEN DAVIS MITCHELL and DOUBLEDAY AND COMPANY,

Petitioners and Defendants,

vs.

PAUL BINDRIM,

Respondent and Plaintiff.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Brief of Amici Curiae Writers Guild of America, West, Inc.; Writers Guild of America, East, Inc.; Authors League of America; Association of American Publishers, Inc.; and Independent Literary Agents Association, Inc., in Support of Petitions for Writ of Certiorari of Petitioners and Defendants Gwen Davis Mitchell and Doubleday and Company.

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GWEN DAVIS MITCHELL and DOUBLEDAY AND COMPANY,

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Brief of Amici Curiae Writers Guild of America, West, Inc.; Writers Guild of America, East, Inc.; Authors League of America; Association of American Publishers, Inc.; and Independent Literary Agents Association, Inc., in Support of Petitions for Writ of Certiorari of Petitioners and Defendants Gwen Davis Mitchell and Doubleday and Company.

Pursuant to Rules 35 and 42(1) of the Rules of this Court, the above named *amici* respectfully file their Brief Amici Curiae herein in support of the Petitioners (Gwen Davis Mitchell and Doubleday and Company). The written consents of all parties hereto are concurrently filed with the Clerk of the Court.

Interest of Amici.

Writers Guild of America, West, Inc., and Writers Guild of America, East, Inc. (both hereafter simply "Guild") comprise the collective bargaining agent of writers employed by producers for the purpose of preparing literary material for entertainment motion pictures, television, and radio. The Guild has collective bargaining agreements with producers of films produced for or exhibited over television and with the three major television and radio networks.

The Authors League of America, Inc., is the national society of professional authors and dramatists. Many of its members write works of fiction: novels, plays and short stories.

The Association of American Publishers, Inc. ("AAP") is a trade association whose more than three-hundred members includes most of the nation's leading book publishing firms. AAP members publish a wide range of books, including works of fiction: novels, short stories and dramatic works.

Independent Literary Agents Association, Inc. ("ILAA") is a not-for-profit membership corporation consisting of professional literary agents whose principal purpose is to protect and enhance the interests of those agents and the authors they represent. Many of the clients represented by ILAA members are authors of contemporary fiction, much of which is based on or inspired by actual persons or events.

Amici respectfully appear here to urge in behalf of writers, publishers and literary agents that society's interest in permitting the fullest freedom to literary creativity requires that Certiorari be granted by this Court and the judgment of the Court of Appeals be reversed.

Preliminary Statement and Summary of Argument.

This *amici curiae* brief is confined to First Amendment issues and brings to the Court the concerns of writers and publishers of fiction and drama.

In Amici's view, important questions are presented on two levels:

First, as a matter of constitutional law under the First Amendment, can there be liability in defamation based upon a novel which is clearly labelled to be fiction, which was and is understood by all readers to be fiction, and which does not name the plaintiff as a character but, in fact, describes the allegedly offending fictional character as physically wholly different from the plaintiff. Amici submit that there should be no liability, and that to permit liability will severely inhibit creative writers.

Second, on a procedural or evidentiary but no less important and constitutional level, and assuming that there can be liability, must plaintiff prove identification by clear or convincing evidence or only by a preponderance of the evidence. Amici submit that plaintiff must prove *every* element of his case by clear and convincing evidence, that the instruction (C 110) in this case—where plaintiff stipulated he was a public figure—was erroneous in requiring plaintiff to produce only a preponderance of the evidence, and that in any event the testimony of three insiders cannot, as a constitutional matter, support a finding for plaintiff on the issue of identification.

I

Where a Novel Does Not Utilize the Name of the Plaintiff and Describes the Allegedly Offending Fictional Character as Wholly Different in Physical Appearance and Characteristics From Plaintiff, There Can Be No Defamation Based Upon the Fictional Work. A Contrary Rule Would Impose an Intolerable Burden on Creative Writers and Publishers.

In the case at bar, the novel "Touching" deals with a nude encounter workshop. It dramatizes the dangers and underlying coarseness of some encounter therapy methods which masquerade as psychotherapy in Southern California. It describes the leader of the group, the fictional therapist, as a person "who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession." (Dissenting opinion of Presiding Justice Files, slip opinion p. 35.) The plaintiff complains that he has nevertheless been defamed and injured in his profession by the depiction of the therapist in the novel. *E.g.*, the fictional therapist uses exceedingly vulgar language and simplistic and insensitive analysis, and therefore it is contended that the plaintiff has been inaccurately described and defamed.

It is not disputed that "Touching" is a novel and that it was and is understood by all readers to be fiction. The nude encounter therapist's technique is dramatized as coarse and heavily sexually oriented and emotionally disturbing. With exceptions which are statistically of no consequence, the thousands of readers of the novel, that is, the audience for which it was intended, have never experienced nude encounter groups and do not know the names or identities of any persons,

including the therapist, who were present at the sessions which the novelist attended.

We respectfully submit that to permit an action for defamation on such a record offends the First Amendment and will stifle creativity. The work is clearly labeled a novel, a fiction, and the fictitious therapist has a name, identity and appearance all different from plaintiff's. If the novelist and her publisher here are held to answer, writers and novelists everywhere will be inhibited from drawing on their personal knowledge and insights into real persons. But that is what novelists have done from time immemorial.

Dramatic expressions, including novels and other works of fiction, and their publication are protected by the First Amendment.

> *Winters v. New York,* 333 U.S. 507, 510, 92 L.Ed. 840, 847 (1948);
>
> *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 3 L.Ed.2d 1512 (1959);
>
> *Barrows v. Municipal Court,* 1 Cal.3d 821, 83 Cal.Rptr. 819 (1970).

This Court itself has drawn no distinction between the informative function of the press and that of "novelists, academic researchers, and dramatists." *Branzburg v. Hayes,* 408 U.S. 665, 704-705, 33 L.Ed.2d 626, 653 (1972). The novelist, the film writer, the dramatist creates from observation of real persons, and unless his creations are based upon acute observation, they will fail as literature.[1]

---

[1]The thought was put as follows 375 years ago by Cervantes in "Don Quixote":

> ". . . fiction is all the better the more it looks like truth, and gives the more pleasure the more probability

(This footnote is continued on next page)

Fictional characters are based in part on real persons whom the author has known or observed. Sometimes the author takes traits of several persons and combines them in one, or highlights a particular trait in a fictional character. Many famous literary characters have been based almost entirely on a single living person.[2]

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and possibility there is about it. Plots in fiction should be wedded to the understanding of the reader, and be constructed in such a way that, reconciling impossibilities, smoothing over difficulties, keeping the mind on the alert, they may surprise, interest, divert, and entertain, so that wonder and delight joined may keep pace one with the other; all which he will fail to effect who shuns verisimilitude and truth to nature, wherein lies the perfection of writing." (Part I, Ch. 47; Great Books Ed., Vol. 29, p. 184.)

[2]It is impossible to list all the novels and plays in which principal characters have been grossly based on specific persons living at the time of the publication. Here is a brief sampling of some modern works from various media:

Novels:

"Remembrance of Things Past", by Marcel Proust. The characters were based on socially prominent Parisians. Baron de Charlus is thought to have been based on Count de Montesquiou.

"Point Counter Point", by Aldous Huxley.
The leading characters were based on prominent literary figures, including Lady Ottoline.

"Cakes and Ale", by Somerset Maugham.
The old novelist Edward Driffield was based upon Thomas Hardy, just deceased at the time of publication. The young ambitious writer Alroy Kear was based on Hugh Walpole, then very much alive.

Plays:

"The Man Who Came to Dinner", by George S. Kaufman and Moss Hart. The character of Sheridan Whiteside was based on Alexander Wolcott. Harpo Marx, Noel Coward and others were thinly disguised.

"The Royal Family", by George S. Kaufman and Edna Ferber. The principal characters were widely believed to be the Barrymores.

Motion Picture:

"Citizen Kane", screenplay by Herman Mankiewicz and Orson Wells. Can anyone doubt that this was based on William Randolph Hearst?

The result below places in peril every writer who draws on his own experience and observations when writing fiction. It also places in peril writers who fictionalize current events or who base their novels on dramatic true-life incidents. The characters in such fiction will be claimed by litigants to be based on real persons even when such is not the case. Writers and publishers will inevitably be subjected to increased litigation, leading to self censorship and a restraint on creative writing and discouraging "the boldness of expression indispensable for a progressive society." (See *Kingsley International Pictures Corp. v. Regents of University of New York* (1959) 360 U.S. 684, 695, 3 L.Ed.2d 1512, 1520, Frankfurter, J., concurring.)

II

To Permit Works of Fiction to Be the Basis for Defamation Actions Places Writers and Publishers in a "Catch-22" Situation Which Will Seriously Inhibit Creativity.

To the extent that the novel follows actual happenings, it is true to life with or at least calls to mind the sessions the novelist attended. Even there, however, the book does not purport to be and is not a news account—it is still fiction and its characters are developed in the novelist's imagination as sparked by the events she witnessed. No one could contend that Dr. Herford, bearded and fat, was plaintiff Dr. Bindrim. Yet to the extent that the language of the fictional

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Television:

"Washington Behind Closed Doors", television mini-series based on a novel by John Ehrlichman. Although fiction, the work was unashamedly based upon Watergate and the real persons who were involved. Teleplay by David Rintels.

Dr. Herford differs from the language actually used by Dr. Bindrim, it is now contended that Dr. Bindrim has been libelled.

This approach is deadly to creativity. Fiction which lives and talks to us with conviction and feeling does so precisely because it is grounded in reality. The imaginative touch and the insightful fictionalized detail give it life. But the court below penalizes the writer for part of what he adds to his observations while ignoring the overwhelming parts which make the work a fiction and not a libel of plaintiff. That is, the complementary or neutral materials which correspond with plaintiff (*e.g.* leader of an encounter group) are utilized to stablish his identity as the person libelled—but this is done by disregarding the categorically different complementary or neutral materials which distinguish the fictional character from the plaintiff; *e.g.*, name, physical description, training. (To the ordinary reader, of course, the name and physical description would be determinative that Dr. Herford is not Dr. Bindrim.) The dramatized and allegedly defamatory materials are then utilized to impose liability; *e.g.*, particular obscenities and vulgarisms. (Even though in this case those vulgarities are extensions of language used by the plaintiff and utilized by the novelist to dramatize the vulgar core of the psychotherapy sessions.)

With deference, we submit that this places the novelist in a "Catch-22" situation. Professor Kalven's comment, quoted by Justice Files in his dissent, is precisely in point:

> "There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all

> appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place . . . ." Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment." 1964 The Supreme Court Review 191, 199.

A rule such as promulgated by the Court of Appeal is socially undesirable and violative of the First Amendment. It is a loose cannon on the deck of creativity.

The statements in lower court opinions are not uniform in the weight they give to differences (*e.g.*, name, age, education, physical appearance, etc.) between a fictional character and a plaintiff who claims he has been libelled. See cases gathered in *Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141, 143 (4th Cir. 1969). With respect, we submit that this Court should speak to the issues raised by this case and that the proper analysis and the turnabout in libel law made by *New York Times* and its progeny require the rule we argue for.

III

Assuming That Liability May Be Permitted Based Upon a Work of Fiction, the Plaintiff Nevertheless Must Prove That the Publication Was of and Concerning Him by Clear and Convincing Evidence, and Not Merely by a Preponderance of the Evidence.

Plaintiff concededly was a public figure, and stipulated to that status.

The clear and convincing standard of proof which a public figure plaintiff must present applies to the proof that the alleged libel was published of and con-

cerning him. That issue is also a constitutional one for a reviewing court. *New York Times Co. v. Sullivan,* 376 U.S. 254, 288-289, 11 L.Ed.2d 686 (1964) is conclusive on these points, and they are required to be followed by California Courts.

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied* 429 U.S. 1062 (1977), also expressly holds that the clear and convincing standard of proof is not confined to the issue of malice. Rather, it also determines the meaning, and thus, the application of the publication to the plaintiff.

The instructions here erroneously relieved the plaintiff of his burden and require reversal. (See Plaintiff's instruction B, CT 110-111.) Further, we submit that where the publication is a mass entertainment novel published and distributed nationally in hundreds of thousands of copies, where it is clearly and unequivocally labelled and sold as fiction and not fact, proof that the alleged libel (assuming that fiction can libel at all) was of and concerning the plaintiff is not made by the testimony of three insiders.[3] Such testimony simply does not rise to the level of "clear and convincing proof" that the novelist deliberately or recklessly portrayed the plaintiff in a libellous light and that the average reader identified the character in the novel with the plaintiff.

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[3]Respondent's argument that communication of a libel to a single person is sufficient is correct—but it is misdirected. There is no issue concerning publication in this case. The novel admittedly was published and distributed nationally. The threshhold issue in this case is whether the publication was of and concerning the plaintiff, and plaintiff simply does not carry his clear and convincing burden on that issue by relying on the testimony of insiders. Stated otherwise: the understanding of two or three readers that the publication referred to plaintiff is not supportable by the rule that communication of a libel to a single person is sufficient on the issue of publication.

Conclusion.

If the opinion of the California Court of Appeal is permitted to stand, the novelist's freedom of expression will be chilled by fear of defamation actions.

The Petition for Certiorari should be granted by this Court and the judgment of the trial court should be reversed.

DATED: October 8, 1979.

Respectfully submitted,

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